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# Supreme Court of the United States

OCTOBER TERM, 1903.

No. 230.

ROBERT L. WEST AND GEORGE I. KLINE,
PLAINTIFFS IN ERROR,

*versus*

THE STATE OF LOUISIANA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

*"The right of the accused to confrontation in Criminal Prosecutions as protected by the Fourteenth Amendment."*

ARGUMENT OF LIONEL ADAMS ON BEHALF OF PLAINTIFFS IN ERROR.

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## STATEMENT OF THE CASE.

Robert L. West and George I. Kline, plaintiffs in error, were proceeded against by information before the Criminal District Court, State of Louisiana, February 25, 1902, charged with the *grand larceny* of certain *valuables* alleged to be the property of one Paul G. Thebaud. (Record, p. 1.) Upon this accusation, issue was joined by plea of "Not Guilty."

The information was predicated upon the result of a preliminary examination held by the judge of the First City Court of New Orleans. Before this committing mag-

istrate the same complaint had been lodged by affidavit, based upon information received. (Record, p. 10.)

The pretense was, that the jewelry and other property made the subject of the complaint had been stolen in the *city of New York* from Thebaud, by his valet, Edward Kern, Jr., *alias* T. E Manners, and that subsequently while Kerns or Manners was in the St. Charles Hotel in the city of New Orleans, the same property in turn was stolen from him by the plaintiffs in error.

Thebaud came to the city of New Orleans in company with the *agent* of the State of New York, from whose executive a requisition had been issued, demanding the return of Kerns or Manners, as a *fugitive from justice.* Record, p. 24.

The preliminary examination into the charge against Kline and West had been assigned for hearing before the City Criminal Court, January 25, 1903. On the 21st of the same month, Thebaud, expressing his anxiety and intention *immediately* to return to New York, *instead of placing him under bond as a material witness,* the committing magistrate ordered that the accused be summarily brought from the Parish Prison and their counsel was hurriedly notified, after which the testimony of Thebaud was taken *by deposition.* The deposition of Kern *alias* Manners was also taken in like manner before the committing magistrate, contradictorily with the accused, but in due course *on January 25.*

The judge of the lower court found sufficient grounds to *commit* the accused, which was accordingly done, and subsequently they were proceeded against by information in the trial court.

At the trial before the *Nisi Prius* court, upon proof satisfactory to the presiding judge that the witnesses, The-

baud and Kern, were *permanently absent* from the State of Louisiana, *these depositions were permitted to be read to the trial jury as evidence against the prisoners.*

When the effort was made to introduce the depositions, the accused by their counsel *objected* on the grounds that, as it had not been shown that the witnesses were dead, insane or sick, nor that they were absent by the procurement of the prisoners, the reading of such testimony would be in violation of *Article IX* of the Bill of Rights of the Constitution of the State of Louisiana, and in derogation of the Constitution of the United States, *Article VI,* and the *Fourteenth Amendment* to the Constitution of the United States. (Record, p. 19.). The Court having *overruled* the objection and *permitted* the testimony *to be read,* the accused reserved a bill of exceptions, which was duly settled, signed and sealed by the Court. (Record, pp. 99-102.).

~~We again declare that the statutes of Philip and Mary were, in terms, recognized as having been "received as common law in Louisiana," were and are still in force.~~

It so happens that in support of the various bills of exceptions reserved during the course of the trial, the entire testimony heard in the trial court *is incorporated into the record.*

There can be no question as to the *materiality* of the evidence contained in the deposition of Thebaud. Without it, there would have been no proof whatever that any portion of the property described in the information and made the subject matter of the charge, had been *stolen*

from *anybody,* or that it was not in truth and in fact, *the property of the accused themselves.*

The Federal question has been put at issue in every conceivable form. It was propounded when the endeavor was first made to introduce in evidence the depositions of Thebaud and Kerns. (Rec., p. 19.). It was raised pointedly in the *original* motion for a *new trial.*. (Record, p. 119), and renewed with greater particularity in the *supplemental* motion for a *new trial,* (Record, p. 119), and upon the motion and supplemental motion for a new trial being overruled, bills of exceptions were reserved. (Record, pp. 115, 116.).

It is the foundation and sole ground of the *motion in arrest of judgment.*. (Record, pp. 127, 139, 140.).

The three specifications of the *assignment of errors* constitute nothing more than an elaboration of the constitutional questions reserved by *Motion in Arrest of Judgment.* (Record, p. 145-147).

In point of fact, the *trial judge* recognizes *that the issue was before him* in the following excerpt from the reasons assigned for overruling the objection of the accused to the introduction of the depositions of Thebaud and of Kern, or Manners:

> "*Second:* that the testimony is not admissible in evidence, and cannot be read to the jury for the further reason that they (the prisoners) are entitled to be confronted with the witnesses against them in every instance, under Article IX of the Constitution of 1898, and they claim that privilege granted them by law; and at this time the further objection is made that the testimony cannot be read, because under Article IX of *the Bill of Rights of the State and Article VI of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States,*

the accused are entitled to be confronted with their (the) witnesses at all times, and they claim this right at present to the reading of the testimony, on the ground that said testimony cannot be read, and that they have to be confronted with the witnesses, unless it be shown that the witness is dead, insane, sick or absent by the procurement of the defendant or his counsel." (Record, p. 19-20.).

The judge held that the objection was *not* well founded, and allowed the deposition to be read. (Record, p. 21.).

The prisoners having been convicted and sentenced tc hard labor for three years, prosecuted their appeal.

The judgment of the trial court was affirmed in all particulars, but in the "*Statement of the Case,*" made by the *Chief Justice* of the Supreme Court of the State of Louisiana, who was its organ, it is in terms recited that the admission of the deposition of the absent witness *had been formally objected to,* and the question *reserved for review* by the Bill of Exceptions.

In this regard the learned *Chief Justice* says, that:—

"Defendants further objected to the reading of the testimony of Thebaud, a witness for the State, who was claimed to be absent from the State, because the reading of his testimony to the jury was in violation of Article IX of the Constitution of the State of Louisiana of 1898, which prescribed that—

" 'The accused in every instance shall have the right to be confronted by the witnesses against him;'

"That the reading of said testimony—as taken before the First City Criminal Court on the preliminary examination—is in violation of said constitutional provision.

"Furthermore, that the reading of said testimony of said alleged absent witness was not only violative of the Constitution of the State of Louisiana, but is

also violative of the *Sixth Amendment* of the Constitution, as well as the *Fourteenth Amendment* to the Constitution of the United States; also, because it was not shown that the witness Thebaud, was dead, insane, or sick, nor has it been shown that the witness was absent by the procurement of the defendants or either of them. That the reading of said testimony would be in violation of their Constitutional rights." (Record, p. 155).

The Louisiana Court, in disposing of the contentions of the present plaintiffs in error, quoted, *without review thereof*, a number of authorities—upon which it relies to establish the legal principle that the right of confrontation may be abridged without denying "due process of law."

Among the citations are, *Cooley on Constitutional Limitations*, p. 387; *Murray v. Louisiana*, 163 U. S. 101; *United States v. Boyd*, 116 U. S. 616-635; *United States v. Angell*, 11 Fed. Rep. 34.

The court below brushed away the entire controversy with the mere observation:

"Counsel give a very full and interesting statement of the legislation and jurisprudence of England on this subject, but we are controlled by our own legislation and jurisprudence."

Chapman v. Goodman, 123 U. S., 511, 548.
O'Neil v. Vermont, 144 U. S., 323, 358.
Hale v. Akers, 132 U. S., 554, 564.
San Francisco v. Itsell, 133 U. S., 65.
Cole v. Cunningham, *Id.*, 107.
Hopkins v. McClure, *Id.*, 380.
Beatty v. Benton, 135 U. S., 244.
Johnson v. Risk, *Id.*, 107.
Butler v. Gage, 138 U. S., 52.
Beaupré v. Noyes, *Id.*, 462.
Williams v. Heard, 150 U. S., 529.
N. Y. & G. E. R. Co. v. Woodruff, 153 U. S., 689.
Hagar v. California, 154 U. S., 639.

In the petition for Re-hearing filed after the rendering of its opinion and decree by the Louisiana Supreme Court, the questions raised under the Federal Constitution, are again given *with amplification,* and the attention of the tribunal is directed to the fact that although the issue under the *Fourteenth Amendment* to the Constitution of the United States had been directly and seasonably made, and although the point *had been passed upon by the trial judge* adversely to the contentions of the accused, nevertheless in the opinion maintaining such judgment, not the slightest reference, other than that already indicated, had been made to the alleged invasion of the inherent and fundamental rights of the accused. In this application the plea was urged that there could have been no decision in this cause without passing upon the claims asserted by the accused in respect of the protection accorded them by the *Fourteenth Amendment* to the Constitution of the United States, guaranteeing them against the deprivation of life or liberty without due process of law, and entitling them to enjoy the substantial and Constitutional right of confrontation with the witnesses against them, we submit that this issue is still undecided unless the silence of the court is to be held and esteemed a decision adverse to the right claimed and asserted by defendants and appellants.

~~In our view, it seems probable that, in passing upon the soundness of the objection urged against the Louisiana Constitution, the State Court intended to be understood as determining the meaning of the *identical language* employed in the Constitution of the United States, and in the organic law of the State~~.

That plaintiffs in error, by their assignments present to this Court for consideration a decision on the controlling question whether the protection of the *Fourthteenth*

*Amendment to the Constitution,* guaranteeing to them as citizens of the United States and of the State of Louisiana, *due process of law,* can be claimed under the circumstances related, in a State where in criminal matters the common law is in force in this respect, unmodified by statute, and where the Constitution of the State accords to the accused in all criminal cases *the right to be confronted with the witnesses against him.*

In our view, it seems probable that, in passing upon the soundness of the objection urged against the Louisiana Constitution, the State Court intended to be understood as determining the meaning of the identical language employed in the Constitution of the United States and in the organic law of the State.

## ASSIGNMENTS OF ERROR.

"Now come the plaintiffs in error, and each of them, severally and in his own behalf, and on their writ of error from the Supreme Court of the United States say that in the record and proceedings in said cause, there is manifest error to their prejudice, which they assign as follows, to-wit:

I.

"That the said Supreme Court of Louisiana erred in deciding against the validity of an authority exercised under the authority of the United States, drawn in question in this case.

II.

"That the said Supreme Court of Louisiana erred in deciding against the title, right, privilege, and immunity spe-

cially set up and claimed by plaintiffs in error under the Constitution and statutes and authority exercised under the United States.

III.

"That the said Supreme Court of Louisiana erred in deciding in favor of the validity of the statutes and authorities exercised under the State of Louisiana, drawn in question in this case, on the ground of their being repugnant to the Constitution and laws of the United States.

IV.

"That the Honorable the Supreme Court of Louisiana erred in denying to the defendants the privileges and immunities accorded them by the Fourteenth Amendment to the Constitution of the United States, and which privileges and immunities, as citizens of the United States, they specially plead, demanding, in accordance with law, their maintenance by the Court and the reversal of the verdict and judgment pronounced thereon, in the trial court, against the plaintiffs in error.

V.

"That the Honorable the Supreme Court of Louisiana erred in denying to plaintiffs in error, as citizens of the United States, the protection of the Constitution of the United States and of the amendments thereto; that defendants were tried and convicted without the benefits, advantage, and protection guaranteed to them by the Fourteenth Amendment to the Constitution of he United States, whereas they should have had, at all stages during their said

trial, the benefit and protection of said amendment, and particularly of so much thereof as guarantees to them due process of law; and that the refusal and denial of said Supreme Court of Louisiana to accord them this constituoional right in the course and progress of said trial, and at all times since, is assigned as error herein.

VI.

"That the Honorable the Supreme Court of Louisiana erred in that, during the progress of the trial before the traverse jury, the *ex parte* depositions of one Paul C. Thebaud and one T. E. Manners, alias Kern, were administered and allowed, and considered by the traverse jury under the ruling of the trial judge, after timely objection; which depositions and the statements therein contained, so administered, were material and controlling in the cause, and without which, as appears by the record, no conviction could have been secured; and that the admission of said *ex parte* depositions, the consideration of the same by the jury under the direction of the Court, and the denial to the accused of the right of confrontation with the witnesses against them, were in violation of the rights of plaintiffs in error, in violation of the common law, and in violation of the Fourteenth Amendment to the Constitution of the United States, which guaranteed to plaintiffs in error, and to each of them, due process of law.

VII.

That said trial court erred in allowing the administration of the *ex parte* depositions of said Paul G. Thebaud and T. E. Manners, alias Kern, and directing the considera-

tion of the same by the trial or traverse jury, depriving plaintiffs in error, and each of them, of the benefits, advantage, and protection guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, under which amendment is embraced the substantial and fundamental right of confrontation in criminal cases with the witnesses against the accused, and which said right, with the limited exceptions fixed by the common law, is absolute, and its denial or limitation is in violation of the Fourteenth Amendment to the Constitution of the United States, guaranteeing to all the citizens of the United States due process of law.

VIII.

That the said Court erred in maintaining the right of the trial court to withdraw an issue of fact from the jury—to-wit, whether the proper predicate had been established by the evidence administered, to admit of substituted proof of a fact material to the State's case; that under the common law as administered in the State of Louisiana, and under the protection of due process of law accorded by the Fourteenth Amendment to the Constitution of the United States, the question as to whether a proper predicate had been laid for the administration of subordinate and secondary proof, was a question determinable not by the Court but by the jury, and before the administration of secondary proof, and particularly the *ex parte* depositions of the said Thebaud and the said Manners, alias Kern; and that the action of the Court, as appears by the record, in determining a question of fact which should have been, under the laws and Constitution of the United States, submitted to the jury, violates

petitioners' rights under the common law and as protected by the said Fourteenth Amendment to the Constitution of the United States, inasmuch as it operates a denial of the benefits and protection accorded to the plaintiffs in error by the said Fourteenth Amendment to the Constitution of the United States.

IX.

That the trial court erred in admitting, and the said Supreme Court of Louisiana erred in considering, the *ex parte* depositions of said Thebaud and said Manners, alias Kern, inasmuch as there was not a sufficient predicate laid, under the common law, for the administration of that character of proof, it not being shown that the parties whose depositions were sought to be used were dead, or insane, or absent by the connivance or procurement of the accused; and the court, by its act in the admission of said depositions, with directions to the jury to consider the same, denied to plaintiffs in error, and to each of them, the benefits, advantage, and protection guaranteed to them by said Fourteenth Amendment to the Constitution of the United States, inasmuch as they had not an opportunity of confrontation with the witnesses against them, and the pretended statements made by said Thebaud and said Manners, alias Kern, were not admissible as evidence against plaintiffs in error, or either of them, and should not have been submitted by the trial court to the traverse jury, nor considered by the honorable the Supreme Court of Louisiana, in the absence of a predicate fully established under the conditions and limitations of the com-

mon law; without the establishment of such predicate, the character of proof aforesaid should not have been admitted or considered; and its consideration by the traverse jury, under the directions of the trial court, and the affirmance by the honorable the Supreme Court of Louisiana of the action of the trial court in this respect, was in disregard of the protection guaranteed to plaintiffs in error by the Fourteenth Amendment to the Constitution of the United States, prohibiting a State, and each and all of its agencies, from depriving any person of his life, liberty, or property, without due process of law.

Wherefore, plaintiffs in error pray that the judgment of said Supreme Court of Louisiana be reversed, and for such further proceedings as law and justice may require.

ARGUMENT OF LIONEL ADAMS ON BEHALF OF PLAINTIFFS IN ERROR.

*May it please the Court:*

It would be impossible to overstate the importance and far-reaching effect of the issues presented here to your Honors for consideration and decision. To this tribunal is now *properly* submitted for the first time in the judicial history of our courts the question whether the substantial and fundamental right of an American citizen under a State Constitution to be confronted with witnesses produced against him at a trial for felony before a State court, are safe-guarded against encroachment by either the legislative, executive or judicial departments of the State Government, by the force and virtue of the Fourteenth Amendment to the Constitution of the United States, which in its

prohibitive language and restrictive force denies to the States the right, through any of their agencies to deprive a citizen of his life, liberty or property without due process of law.

The assignment of errors raises pointedly the issue whether the plaintiffs in error have been constitutionally tried and legally convicted of the offense of which they were accused. The only showing made during the progress of the trial, that the actual crime charged had been committed by any one, is set out in the declarations of Thebaud and Kern (or Manners), *taken under the circumstances related,* and with a view, not of determining the question of guilt or innocence, but of ascertaining whether the proof was sufficient to hold the accused for further accusation by the grand jury or by the prosecuting officer.

The admission of such depositions—under the circumstances disclosed by the record in this case, and without any attempt to offer the slightest proof that the prosecuting witness was removed from the jurisdiction of the court by procurement or connivance on the part of the accused—denies to them not only the protection afforded by the organic law of the State when it accorded in its bill of rights to every citizen charged before its courts with an offense the right in *all* criminal prosecutions "to be confronted with the witnesses against him," but it violates moreover one of the substantial and fundamental rights of every American citizen, who enjoys, as his birthright and by right of inheritance, the protection accorded him by the Fourteenth Amendment to the Constitution of the

United States, and would have the effect, if countenanced by the judicial department of the Federal Government, of depriving him of his liberty *without due process of law.*

The proposition of law which this high court is asked to affirm is that the right of the accused to be confronted with the witnesses against him, as known to the common law of England, is essential to that "due process of law," when applied to prosecutions for felonies, which is secured and guaranteed by the provisions of the Fourteenth Amendment to the Constitution of the United States, and which accordingly it is forbidden to the States respectively to dispense with in the administration of criminal law.

Due process of law, as used in the constitutions of the State of Louisiana and of the United States, is understood to mean "the law of the land;" not every arbitrary enactment of a legislature or erroneous decision of a court, but those only that respect and preserve inviolate the substantial and fundamental rights of the citizen, guaranteed in *Magna Charta* and "wrung from King John at the point of the sword," of which the people of the United States are the natural and adjudged inheritors. Those rights came to us, and constitute with us a fundamental part of our Government, the bulwark of our liberties, without which a species of despotism would prevail, more dangerous to the happiness and safety of the American citizen, than the rule of anarchy itself.

The Fourteenth Amendment to the Constitution of the United States, operating *proprio vigore* upon the States,

lays its prohibition, in terms definite and exact, upon each of the commonwealths of the Union. It not only reaches the State, as a community, in its force and effect, but, in its operation, it extends to every department, legislative, executive and judicial. The provisions of the constitutional article were used with reference to the condition and state of the citizen and the state of the law, at the time of the adoption of the Constitution of the United States.

The prohibitory clause in the Federal Constitution, that no State shall deprive any person of life, liberty, or property without due process of law, had a fixed, definite, and ascertained meaning; and in the sense in which it was understood and applied by our ancestors, it was adopted as part of the fundamental law of this country.

Repeated adjudications of the Supreme Court of the United States, construing the Fourteenth Amendment, and interpreting its effect, all recognize that the expression "due process of law" is to be understood now as it was understood by our ancestors in their interpretation of the *Magna Charta*, and, in consequence of that construction, embrace those substantial and fundamental rights essential to the protection of the lives, liberties and property of American citizens.

In construing this article of the Constitution, Mr. Justice Miller, speaking for the court in *Davidson v. New Orleans*, 96 U. S. 99, said that it was to be interpreted and construed upon the lines of inclusion and exclusion. In other words, that it was for the judicial department of the Gov-

ernment to say, with due regard to the fundamental rights of the citizen, what was protected by the prohibition and therefore within its terms, and what rights were not affected, and therefore excluded from its operation; and that no exact and precise definition could be announced, but that each case must depend for its determination upon the primary inquiry whether the rights of the citizen sought to be affected were of that substantial and fundamental character which were safeguarded by the canons of the common law as carried into the Fourteenth Amendment, guaranteeing to the citizens of the United States protection against the deprivation of life, liberty, or property, without due process of law.

In this same case it was held:

> "It must be confessed, however, that the constitutional meaning or value of the phrase 'due process of law,' remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the constitutions of the several States and of the United States.
>
> "It is easy to see that when the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the Crown, except as provided by the law of the land, they meant by 'law of the land' *the ancient and customary laws of the English people, or laws enacted by the Parliament of which these barons were a controlling element.* It was not in their minds, therefore, to protect themselves against the enactment of laws by the Parliament of England. But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'no State shall deprive any person of

> life, liberty, or property without due process of law,' *can a State make anything due process of law which, by its own legislation, it chooses to declare such?* To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation."

After reviewing the earlier jurisprudence, construing the Fifth Amendment to the Constitution, Mr. Justice Miller continued:

> "But, apart from the imminent risk of a failure to give any definition which shall be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of *judicial inclusion and exclusion,* as the cases presented for decision shall require, with the reasoning on which such decision may be founded. This Court is, after an experience of nearly a century, still engaged in defining the obligation of contracts, the regulation of commerce, and other powers conferred on the Federal Government, or limitations imposed upon the States."

In the recent case of *Holden v. Hardy,* 169 U. S., there was in issue the construction of a local statute regarding labor and the hours of its employment, in which was involved the question of the police power of the State. An exemption from the effect and operation of the statute, was urged under this provision of the Fourteenth Amendment; and while it was held that the particular statute in question was within the legitimate domain of State legislation and unaffected by the Fourteenth Amendment, the

learned justice who delivered the opinion carefully reviewed the jurisprudence of the Supreme Court construing the amendment, and in the course of his opinion announced:

> "The Fourteenth Amendment, which was finally adopted July 28th, 1868, largely expanded the power of the Federal Courts and Congress, and for the first time authorized the former to declare invalid all laws and *judical decisions* of the States *abridging* the rights of citizens or *denying* them the *benefit* of due process of law."

And in the same case, page 387, Mr. Justice Brown proceeded:

> "This case does not call for an expression of opinion as to the wisdom of these changes, or their validity under the Fourteenth Amendment, although the substitution of prosecution by information in lieu of indictment was recognized as valid in *Hurtado v. California,* 110 U. S. 516. They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that *while the cardinal principles of justice are immutable,* the *methods* by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a large extent *inflexible and exceedingly difficult of amendment,* should not be so construed as to deprive the States of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare *without bringing them into conflict with the supreme law of the land.*"
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> * * * * * * * * *
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> "We do not wish, however, to be understood as holding that this power is *unlimited.* While the people

of each State may doubtless adopt such systems of laws as best conform to their own traditions and customs, the people of the entire country have laid down in the Constitution of the United States certain fundamental principles to which each member of the Union is bound to accede as a condition of its admission as a State.

In addition, the Fourteenth Amendment contains a *sweeping* provision forbidding the States from abridging the privileges and immunities of citizens of the United States, and denying them the benefit of due process or equal protection of the laws.

Said your Honors:

"This Court has never attempted to define with precision the words 'due process of law,' nor is it necessary to do so in this case. It is sufficient to say that there *are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard,* as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense. What shall constitute due process of law was perhaps as well stated by Mr. Justice Curtis in *Murray's Lessees v. Hoboken Land Co.*, 18 Howard, 272, 276, as anywhere. He said: 'The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. *It is manifest that it was not left to the legislative power to enact any process which might be devised.* The article is a restraint on the legislative as well as on the executive and judicial powers of Government, and cannot be so construed as to leave Congress free to make any process 'due

process of law,' *by its mere will.* To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those *settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors,* and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of the country."

Having next reviewed the opinion of Mr. Justice Miller in *Davidson v. New Orleans,* the learned justice added:

"Recognizing the difficulty in defining, with exactness, the phrase 'due process of law,' *it is certain that these words imply a conformity with natural and inherent principles of justice,* ..... and that no one shall be condemned in his person or property without an opportunity of being heard in his own defense."

And it was determined by Mr. Justice Gray in the case of *Lowe v. Kansas,* 163 U. S. 85, that—

"Whether the mode of proceeding prescribed by this statute and followed in this case, was due process of law, depends upon the question whether it was in substantial accord *with the law and usage in England* before the declaration of Independence, and in this country, since it became a nation, in similar cases."

In the Civil Rights Cases, 109 U. S., page 11, Mr. Justice Bradley, in delivering the opinion of the court, said:

"The first section of the Fourteenth Amendment, (which is the one relied on), after declaring who shall

be citizens of the United States, and of the several States, is prohibitory in its character, *and prohibitory upon the States.* It declares that: 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

"*It is State action of a particular character that is prohibited.* Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void *all State legislation, and State action of every kind,* which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen,* the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null and void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; *but to provide modes of relief against State legislation, or State action, of the kind referred to.* It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress *against the operation of State laws, and the action of State officers, executive or judicial,* when these are subversive of the *fundamental rights* specified in the amendment.

Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by the power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect. A quite full discussion of this aspect of the amendment may be found in *United States v. Cruikshank,* 92 U. S., 542; *Virginia v. Rives,* 100 U. S., 313, and *Ex parte Virginia,* 100 U. S., 339."

On page 23 the learned justice continues:

"Under the Fourteenth Amendment, it has power to counteract and render nugatory all State laws, and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty, or property without due process of law, or to deny to any of them the equal protection of the laws.....As we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings."

On page 13 of the same case it is declared:

"And so in the present case, until some State law has been passed, or through its officers or agents some State action has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity; for the prohibitions of the amendment are *against State laws and acts done under State authority.*"

*In United States v. Cruikshank et als.*, 92 U. S., 554, Chief Justice Waite said:

> "The Fourthteenth Amendment prohibits a State from depriving any person of life, liberty. or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. As was said by Mr. Justice Johnson, in *Bank of Columbia v. Okely*, 4 Wheat., 244, it secures 'the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.' "

The declared purpose of the Fourteenth Amendment was to protect the citizen in the enjoyment of his fundamental rights. That protection was already secured to him as against National legislation. It was intended by the *Fourteenth Amendment* to protect him against State action, and this, whenever those fundamental rights were sought to be disturbed, the effect of which would have been to deny to the citizen the *Due Process of Law*. Now, if it is competent for the State, either by constitutional provision, statutory direction or judicial decision, at its pleasure, to deny to the citizen the enjoyment and protection of his fundamental rights, *wherever life, liberty or property are involved*, then the Fourteenth Amendment is a hollow mockery, and *instead of securing protection*, is an invitation to the States to *evade* its provisions. What are the fundamental rights of an American citizen, must be ascertained

primarily from the *Charter of Liberties* of our ancestors, which have been solemnly incorporated in the Constitution of the United States, in the Sixth and Fourteenth Amendments thereof, our own local *Constitution* and the express provisions of Section 975 of the Revised Statutes of the State.

Mr. Guthrie in his lectures upon the Fourteenth Amendment to the Constitution, discusses with recognized ability the historical origin and effective force of the words "due process of law" as used therein. He says:

> "The phrase 'due process of law' antedate the establishment of our institutions, and is endeared to our race by antiquity and the noblest hisorical associations. It embodies one of the broadest and most far-reaching guaranties of personal and property rights. Indeed, no words in our language signify more in respect of the rights and privileges of the individual than 'due process of law.'
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> "This pledge of individual rights and liberties is in the Constitution of the United States in a twofold sense; in the Fifth Amendment it is a limitation upon the powers of the National Government; in the Fourteenth Amendment it is a limitation upon the powers of the States. Without venturing to attempt any specific definition, it may be said that the general scope of the provision requiring due process of law is to secure to every person, whether citizen or alien, those fundamental and inalienable rights of life, liberty, and property which are inherent in every man, and to protect all against the arbitrary exercise of governmental powers in violation and disregard of *established principles of distributive justice.* This protec-

tion is the object and essence of free government and without it true liberty cannot exist.

* * * * * * * * * * *

"No statement of the general meaning of the phrases 'due process of law' and 'the law of the land' is more often quoted than that given by Mr. Webster in the Dartmouth College case. It defines the term in its relation to procedure as well as to substantive rights. Mr. Webster said: 'By the law of the land is most clearly intended the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land.' Judge Story's definition is succinct and accurate: 'Due process of law in each particular case means such an exertion of the powers of government as the *settled maxims of law permit and sanction,* and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs.' "

These references to the opinions of the court, given in general but expressive terms, are submitted for the purpose of indicating the judicial interpretation placed by the ultimate tribunal upon the phrase "due process of law." It is not our intention to pursue the discussion beyond the necessities of an issue affecting only the *person* of the subject, for we have no manner of concern save with the construction that is to govern under the guarantee that no person shall be deprived of life, or liberty, without due process of law.

Called upon to deal exclusively with the meaning attached to this expression, when thus restricted to life and liberty, we are relieved from the necessity of discussing the opinions of this court applying to cases in respect of those rights affecting property which are safeguarded by the requirement as to them of "due process of law."

In the qualified sense above stated, there are to be deduced from the cases the following general principles:

1. That the Fourteenth Amendment is prohibitive and restrictive upon the States, and upon the legislative, executive, and judicial departments of the State governments, and all of their agencies;

2. That the prohibitions and restrictions directed against the State and its agents, operate *proprio vigore;*

3. That against State action, legislative, executive, and judicial, those substantial and fundamental rights of the citizen are protected of which he cannot be deprived, since they are based upon cardinal principles of justice, that are immutable;

4. That under the terms used in the amendment, "due process of law," are embraced those substantial and fundamental principles of right, indestructible and unchangeable, contained in the bill of rights, and safeguarded by the prohibitions of the Constitution;

5. That it is to be ascertained by the judiciary, without declaring in advance but determining each case as it arises, whether the protection claimed under the bill of rights is of such a substantial and fundamental character as to fall

within the operation of the prohibitive language of the Constitution; and that this is to be determined upon the lines indicated, of inclusion and exclusion;

6. That to determine whether the right asserted is of the substantial and fundamental character thus safeguarded by the Constitution from impairment or destruction, we are directed to the common law of England prevailing at the time of the adoption of the Constitution, and to the glorious and imperishable bill of rights *contained in Magna Charta.*

What those substantial and fundamental rights are, founded upon the immutable principles of justice; the birthright and inheritance of the American citizen, protected at all times by the Constitution of the United States from impairment and destruction, it is not necessary nor useful at this time to enumerate. As Mr. Justice Washington had occasion to say, in *Caufield v. Coryell,* 4 Wash., C. C. Rep., 371:

> "What these fundamental principles are, it would be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain hapiness and safety, subject nevertheless, to such restraints as the government may prescribe for the general good of the whole."

But whether we undertake to enumerate all or only some of the rights thus protected, it is sufficient, for the consideration and decision of this case, to point out in the bill of

rights that substantial and fundamental principle which, in criminal prosecutions, accords at all times to the accused the absolute right of being confronted with the witnesses against him, subject only to those well-recognized exceptions established and enforced in the practice of the English courts at common law at the time of the adoption of the Federal Constitution. That right, founded upon the principles of immutable justice, declared in the Great Charter of the liberties of our ancestors and embodied in the fundamental law of the land, is the protection of the accused against the arbitrary acts of his State and the despotism of those upon whom the responsibility rests in the prosecution and trial of crime. It is enumerated as one of the sacred heritages of every American citizen, in the Constitution of every State in the Union, we believe, but three. Under the original amendments to the Constitution it is a restraint upon the National Government, and in the Fourteenth Amendment it is carried into the general declaration that no man shall be deprived of his life, liberty or property without due process of law, which embodies a prohibition operating upon the States in the protection of this substantial and fundamental right.

In the case of *Brown v. Walker*, 161 U. S., 600, Mr. Justice Brown, speaking generally of the substantial and fundamental rights inherent in the citizen and protected by the Constitution of the United States as embodied in the bill of rights embraced within the original eight amendments to the Constitution, said:

"As the object of the first eight amendments to the

> Constitution was to incorporate into the fundamental law of the land *certain principles of natural justice which have become permanently fixed in the jurisprudence of the mother country,* the construction given to those principles by the English courts is cogent evidence of what they were designed to secure, and of the limitations that should be put upon them. This is but another application of the familiar rule that where one State adopts the laws of another, it is also presumed to adopt the known and settled construction of those laws by the courts of the State from which they are taken (*Cathcart v. Robinson,* 5 Pet., 264, 280; *McDonald v. Hovey,* 110 U. S., 619)."

Mr. Justice Story, in his work on the Constitution, volume 2, section 1791, in dealing with the fundamental rights of an accused charged with the commission of a crime, enumerates among other rights substantial and fundamental, and protected by the bill of rights and the Constitution, the right to be confronted with the witnesses produced against him and declares that in this the organic law of the nation does but follow the established course of the common law in all trials for crime. That learned jurist said:

> "The other article, in declaring that the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State or district wherein the crime shall have been committed (which district shall be previously ascertained by law) and to be informed of the nature and cause of the accusation, *and to be confronted with the witnesses against him, does but follow out the established course of the common law in all trials for crimes.* The trial is always public; the witnesses are sworn, and give in their testimony (at least in capital cases) in the presence of the accused; the nature and cause of the accusations are accurately

laid down in the indictment; and the trial is at once speedy, impartial, and in the district of the offense. Without in any measure impugning the propriety of these provisions, it may be suggested that there seems to have been an undue solicitude to introduce into the Constitution some of the *general guards and proceedings of the common law in criminal trials* (truly admirable in themselves) without sufficiently adverting to the consideration that unless the whole system is incorporated, and especially the law of evidence, a corrupt legislature, or a debased and servile people may render the whole little more than a solemn pageantry. If, on the other hand, the people are enlightened, and honest, and zealous in defense of their rights and liberties, it will be impossible to surprise them into a surrender of a single valuable appendage of the trial by jury."

As a prime essential to an intelligent appreciation of the criticism of Mr. Justice Story, a consideration of the law of England in this respect at the time of the adoption of the Constitution of the United States, to which time must be referred the Fourteenth Amendment, becomes indispensable, for if at that time the substantial and fundamental right of the accused in criminal proceedings to be confronted with the witnesses against him was part and parcel of the law of England, protected by the great charter of the liberties of Englishmen, it must be carried into that provision of the Fourteenth Amendment which protects the citizen against the deprivation of his life, his liberty, or his property without due process of law (*Story on the Constitution*, sec. 1789). If it be a right, substantial and fundamental, based upon the immutable principles of justice, the protecting ægis of the Fourteenth Amendment operates *proprio vigore* against the impairment of the right.

It is the boast of the English law, and justly so, that it protects its citizens and safeguards their rights whenever prosecuted for the commission of crime.

Lord Chief Justice Hale, in his *Pleas of the Crown*, page 33, says:

> "Yet the law of England hath afforded the best method of trial that is possible, of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment, *by the testimony of witnesses viva voce in the presence of the judge and jury, and by the inspection and direction of the judge.*

It is said in *Bacon's Abridgement*, vol. 3, page 512, under the title "Evidence," that—

> "The examination of witnesses *viva voce* in open court is justly esteemed one of the greatest excellencies of our law, not only from the awe and reverence which the solemnity of the manner is supposed to produce in the witness, and the regard which from thence he must have for truth, but also from the benefit of cross-examining; and, further, the air and manner of giving evidence often carry such convictions with them as will induce the court and jury to believe or reject what the witness has sworn. *Hence, it hath always been held as a settled rule, that in cases of life no evidence is to be given against a prisoner but in his presence.*" (See also *ib.*, 630.)

In *Magna Charta*, chap. 29, it is solemnly declared:

> "No freeman shall be taken or imprisoned, or be disseized of his freehold or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man, either justice or right."

Of this charter Lord Coke says: "It is but declaratory of the old law, *Per legale judicium parium suorum, vel per legem terrae;*" and then, commenting on the words *per legale judicium,* he adds: "By the word *legale,* amongst others, three things are implied: 1. That this manner of trial was by law before this statute. 2. That their verdict must be legally given wherein principally it is to be observed: *first,* that the lords *ought to hear no evidence but in the presence and hearing of the prisoner; secondly,* after the lords be gone together to consider of the evidence, they cannot send to the high steward to ask the judges any question of law *but in the hearing of the prisoner,* that he may hear whether the case be rightly put, for *de facto jus oritur;* neither can the lords, when they are gone together, send for one of the judges to know any opinion of law; but the high steward ought to demand it in court *in the hearing of the prisoner.* 3. When all the evidence is given by the King's learned counsel, the high steward cannot collect the evidence against the prisoner, or in any sort confer with the lords touching their evidence *in the absence of the prisoner;* but he ought to be called to it; and all that is implied in this word *legale*" (Lord Coke's Second Inst., 48, 49).

Thus we see that Lord Coke's notion of the expression, "but by the *lawful* judgment of his peers," was what the old law required before the statute known as *Magna Charta,* 9 Henry III, and that no evidence ought to be heard but *in the presence of the prisoner.* This was Coke's understanding of the law, and of this phrase *per legale judicium.*

The framers of the Federal Constitution well knew this; they were familiar with the English *Magna Charta.* They also well knew how often it had been totally denied to prisoners of the English courts to have the witnesses brought into court to meet them face to face. They knew that the statute of Edward VI had been totall disregarded in trials for treason, and to avoid these acts, and to withdraw our State prosecutions from the influence of such authorities as the English courts might present, and to place the matter beyond doubt, they declared and inserted in the declaration of rights, that "in all criminal prosecutions the accused has the right to be heard by himself and his counsel; to demand the nature and cause of the accusation; to have compulsory process for witnesses in his favor; to meet the witnesses against him face to face; and, in prosecutions on presentment or indictment, to a speedy trial by an impartial jury of the vicinage; that the accused cannot be compelled to give evidence against himself, nor be deprived of life, liberty or property, but by the judgment of his peeers or the law of the land."

Nor yet did they rest satisfied with using the words "*per legale judicium parium suorum*" of the English *Magna Charta* which Lord Coke says requires the evidence in criminal prosecutions to be given *in presence of the prisoner,* but they chose the expression, "the accused, in all criminal prosecutions, has the right to meet the witnesses against him face to face, and that he shall not be deprived of life, liberty or property—*nisi per judicium parium suorum, vel per legem terrae*—but by the judgment of his peers or the law of the land. They did not content themselves with the

expression which Lord Coke says requires the evidence to be given in the presence and hearing of the accused, but use the emphatic language, "to meet the witnesses against him face to face;" and also the expression from *Magna Charta*, "*per legale judicium parium suorum, vel per legem terrae.*"

The double enumeration of this right is not to be considered accidental or unmeaning. There was a prudential and protecting care in the bill of rights they wrote into the Constitution. They had seen how the subjects of Great Britain had been denied the benefit of this clause in the administration of the criminal laws, notwithstanding Lord Coke's construction of *Magna Charta*, and they would leave no ground for such a practice here. They remembered a long line of enormities, ending with the attainder of high treason and execution of Sir John Fenwick, upon the deposition of an absent witness which was taken out of the presence and hearing of the accused, and that these abuses became so frequent and flagrant in prosecutions for treason as to provoke the observation from Sir Michael Foster, in his work on *Crown Law*, that he could not find, upon looking over the State trials from the first of Queen Mary to the Restoration, "that in Crown prosecutions any great regard was paid to the acts of Edward VI for nearly a century after they were passed, or indeed to the common well-known rules of legal evidence; though the authors who wrote in those days sometimes speak of the acts as then in force."

Therefore it is that our law requires persons to appear and give their testimony *viva voce*, and we see that the testimony appears credible or not by the very countenances and

the manner of the declarants. Our forefathers contended that it was but justice in criminal cases, pursuant to the spirit of the British Constitution, that the defendant should see his accuser. The framers of our Constitution keenly appreciated the invaluable advantage in public prosecutions for criminal offenses, which resulted from the right to have the witnesses and the accused confronted in presence of the court and jury. Expression, tone of voice, demeanor, and a thousand indescribable *indices* in the appearance and conduct of the witnesses were all-important, and by these the jury could very correctly estimate the amount of credibility they deserved.

Every one must know there is a difference in the effect of the same words when delivered in open court from the mouth of the witness and when read from a deposition. They may seem worthy of credit in the one case, and positively unworthy of all credit in the other. Who can be unmindful of the influence of the manner and carriage of a witness on the stand? There are many things, aside from the literal import of the words uttered by the witness while testifying, on which the value of his evidence depends. These it is impossible to transfer to paper. Taken in the aggregate, they constitute a vast moral power in eliciting the truth, all of which is lost when the examination is had out of court, and the mere words of the witness are reproduced in the form of a deposition. This moral power which, we repeat, is a vast one in the hands of the prisoner and the triers, is intended to be grasped and wielded by this constitutional requirement of "*face to face.*"

A remarkable instance of its force is to be found in the

passage: "And Peter said: 'Man, I know not what thou sayest;' and immediately, while he yet spake, the cock crew. And the Lord turned and *looked* upon Peter, and Peter remembered the words of the Lord, how He had said unto him: 'Before the cock crow thou shalt deny me thrice.' And Peter went out and wept bitterly" (St. Luke's Gospel, ch. xxii, 60, 61, 62). No pen can put on paper words indicative of the power of that *look;* nothing was said; the Lord turned and *looked* upon Peter, and the heart of the sturdy, self-confident disciple became liquified at that look, and he "wept bitterly."

Certain Jews made accusation against St. Paul before the Roman governor, Festus, and demanded judgment against him. Festus said to them: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers *face* to *face,* and have license to answer for himself concerning the crime laid against him. Therefore, when they were come hither without delay on the morrow I sat on the judgment seat, and commanded the man to be brought forth. Against whom, when the accusers stood up, they brought none accusation of such things as I supposed" (Acts, chap. xxv, 16, 17, 18). Here the *presence* of the prisoner in the proud Roman court had the moral force of changing the accusation of his persecutors, who, in his absence, had demanded judgment of death against him; but when compelled to meet and accuse him *face to face,* "brought none accusation of such things" as they had before induced the governor to suppose they would.

It ought to be frankly admitted that the history of criminal prosecutions in England from 1553, when Mary ascended the throne, down to the abdication of James II, in 1680, furnishes cause enough for the introduction of some stringent rule whereby to test the truth of the statements of prosecuting witnesses. Mr. Hallam says (*Constitutional History*, p. 138): "I have found it impossible not to anticipate in more places than one some of those gloomy transgressions of natural as well as positive law, that rendered our courts of justice in cases of treason, little better than the caverns of murderers. Whoever was arraigned at their bar was almost certain to meet a virulent prosecutor, a judge hardly distinguishable from the prosecutor except from his ermine, and a passive, pusillanimous jury. Those who are acquainted with our modern, decent and dignified procedure can form little conception of the irregularity of ancient trials; the perpetual interrogation of the prisioner, which gives most of us so much offense in the tribunals of a neighboring kingdom; and *the want of all evidence except written, perhaps unattested, examinations or confessions.*"

On the trial of Mary, Queen of Scots, the material witnesses were not examined in open court (*Hallam, Const. Hist.*, 90). Of this trial, Dr. Robertson (*History of Scotland*, p. 266), remarks: "If the testimony of Babington and his associates was so explicit, why did not Elizabeth spare them for a few weeks, and by *confronting* them with Mary overwhelm her with the full conviction of her crimes? Naue and Curle were both alive; wherefore did they not

appear at Fotheringay? . For what reason were they produced in the Star Chamber, where Mary was not present to hear what they deposed?" "It is no easy matter to determine whether the injustice of appointing this trial, or the irregularity of conducting it, was greatest or most flagrant."

After *Magna Charta,* and up to the time of the adoption of the statutes 1 and 2 P. & M., c. 13 and 2 and 3 P. & M., c. 10, no testimony could be legally received at a trial upon indictment, except from living witnesses speaking in the presence of the accused of facts within their knowledge.

> Before the statutes of Philip & Mary," observes Mr. Chitty, "depositions thus taken before justices of the peace, in the county where a felony was committed, *were not admissible in evidence even when death or some absolute necessity prevented the witness* from attending" (*Chitty's Criminal Law,* vol. 1, p. 80).

In *King v. Eriswell,* 3 Term, 711, Mr. Justice Grose declared:

> "Before the statute of Philip & Mary, a deposition taken before the justice of the county where the murder was committed was not evidence, *even though the party died or was unable to travel.*"
>
> See also, to the same effect, 2 Hawk. P. C., c. 46, s. 12, p. 606; 1 Chitty, Cr. L., 80.

> "Upon the foot of the 5 & 6 Edw. VI. depositions of witnesses taken by the coroner, or informations taken before justices of the peace, and certified to the gaol delivery pursuant to the statute, are *not* evidence whereon to ground a conviction for petit treason, *if*

*the party be living,* though *unable to travel* or *kept out of the way by the prisoner or by his procurement."*
Foster's Crown Law, 337.

After the statutes of Philip and Mary were enacted, by judicial construction, depositions and proof of statements made under oath at a formal trial in the presence and hearing of the accused, were permitted to be given in evidence wherever it was satisfactorily established that *the deponent was dead, or unable to travel, or was kept away by the means or contrivance of the prisoner.* Finally under the statute of 11 and 12 Vict., c. 42, sec. 17, the rule was made to include witnesses unable, by reason of sickness, to attend the trial, even where the inability was merely temporary.

By a reference to these statutes, it will be observed that the one of earliest date related to felonies alone, while by the enactments of George IV and Victoria misdemeanors were included.

It is needless to remark that neither the statute of George IV, nor that of Victoria, can by any stretch of the imagination be regarded as forming part of the English common law, while, on the other hand, the statutes of 1 and 2 and 2 and 3 Philip and Mary, the last of which was adopted in 1556, are by all accepted authorities treated as constituting part of the common law.

The stamp-act resolution of the General Assembly of Virginia resolved:

"That by the two royal charters granted by King James I, the colonies aforesaid are declared entitled

to all privileges of faithful liege and natural born subjects to all intents and purposes as if they had been abiding and born within the realm of England."

Under other resolutions it was declared:

"That our ancestors who first settled these colonies were at the time of their emigration from the mother country, entitled to all the rights, liberties and immunities of free and natural born subjects within the realm of England."

"That the respective colonies are entitled to the common law of England, and more especially *to the great and inestimable privilege of being tried by the peers of the vicinage according to the course of that law.*"

"That they are entitled to the benefit of such of the *English statutes* as existed at the time of their colonization and which they have by experience, respectively, found to be applicable to their several local and other circumstances."

*State v. Houser*, 26 Mo., 434.

While the statutes of Philip and Mary are recognized by all English writers as forming part of the common law the enactments of *Magna Charta* and the statutes of Edward VI are referred to as belonging to "the ancient common law." George IV ascended the throne in 1820, and the statutes of Philip and Mary continued in force until that reign.

Originally by virtue of the bill of rights secured in *Magna Charta*, the witnesses were required to depose on oath in the presence and hearing of the accused in open court. There was at that time no exception to the rule ex-

cluding all manner of hearsay evidence. At a later period, first the exception was made in the case of dying declarations, in which the evidence as to the issue is the statement of the person injured and in belief of imminent impending dissolution, whose sense of the hopelessness of his condition is regarded as being of equal solemnity with the obligation of an oath. The theory in these cases is that the person speaking as to the declaration of the deceased is a witness as to the fact of the declaration, and testifies in the presence of the accused.

It is needless to add that this exception is restricted to prosecutions for homicide.

After the passage of the statute of Philip and Mary, the courts extended the line of exceptions first to the case of the *death* of the witness who upon oath had previously testified in the presence of the accused; afterwards to case of *death* and of *inability to attend the trial,* from *sickness* considered *permanent in character,* and subsequently, to cases where the absence of the witness was through the *procurement or connivance of the defendant,* and to cases where the witness after testifying *had become insane.* That was the condition of the law at the time of the adoption of the Constitution of the United States.

Thus it will be found that only two exceptions to the general rule requiring the *viva voce* testification of witnesses to the fact in the presence of the accused are noted by Sir Matthew Hale at page 305 of the first volume of his work:

> "By the statute of 1 & 2 P. & M., cap. 14, justices of peace ought to examine the party and take informa-

tions touching offenses brought against them, and certify them at the next gaol delivery.

"Though justices of the peace cannot hear and determine treason by virtue of their commission of the peace, nor take an indictment of it, yet they may take examinations and informations touching such offense of the party brought before them, and certify them according to that statute; and those informations taken upon oath, as they ought to be, and sworn to, by the justice or his clerk, that took them, to be truly taken, may be read in evidence against the prisoner, if the informant be *dead,* or *not able to travel,* and sworn so to be; yea by some opinion, if he were bound over and appear not, they may be read, which seems to be questionable."

So, too, at page 52 of the second volume of his *Pleas of the Crown,* this eminent jurist, speaking of justices of peace, declares:

"By the statute of 1 & 2 Ph. & Mar., cap. 13, they ought to take the examinations of felons (without oath) and the informations of accusers as witnesses (upon oath), and return them to the justices of gaol delivery.

"And these examinations may be read as evidence against the prisoner, and so the informations of witnesses taken upon oath, if they are *dead* or *not able to travel,* for they are judges of record, and the statute enables and requires them to take these examinations; but then oath is to be made in court by the justice or his clerk, that these examinations and informations were truly taken."

Again at page 284, of the second volume of his *Pleas of the Crown,* Sir Matthew Hale repeats his previous declaration in these words:

"By the statute of 1 & 2 P. & M., cap. 13, and 2 & 3 P. & M., cap. 10, justices of peace and coroners have power to take examinations of the party accused, and informations of the accusers and witnesses (the examinations to be without oath, the informations to be taken upon oath), and are to put the same in writing, and are to certify the same to the next gaol delivery.

"These examinations and informations thus taken and returned may be read in evidence against the prisoner, if the informer be dead, or *so sick that he is not able to travel,* and oath thereof made; *otherwise not.*"

As a matter of fact, the rule that the testimony of an absent witness detained by the means or procurement of the prisoner, may be read in evidence against him at the trial, was for the first time resolved by the judges of England in 1666, in the case of Lord Morley prosecuted for murder before his peers (Kelyng's Rep., 55).

In Hawkins' *Pleas of the Crown* (vol. 1, chapter 46, secs. 6 and 7, p. 605), it is said:

"It seems settled, that the examination of an informer taken upon oath, and subscribed by him either before a coroner upon an inquisition of death in pursuance of 1 and 2 Ph. and Mary, c. 13, or before justices of peace in pursuance of 1 and 2 Ph. & Mary, c. 13, and 2 and 3 Ph. & Mary, c. 10, upon a bailment or commitment for any felony, may be given in evidence at the trial of such inquisition, or of an indictment for the same felony, if it be made out by oath to the satisfaction of the court that such informer is *dead* or *unable to travel,* or *kept away by means or procurement of the prisoner,* and that the examination offered in evidence is the very same that was sworn before the

coroner or justice, without any alteration whatsoever.

"But it hath been adjudged, that it is not sufficient to authorize the reading of such an examination, to make oath that the prosecutors *have used all their endeavors to find the witness, but cannot find him.*"

Speaking of Sir John Fenwick's case, which was tried while 7 Will. III (1696) was in force, Sergeant Hawkins says:

"SECTION 12. And in the same case it was agreed, that the evidence given by a witness at one trial, could not in the ordinary course of justice be made use of against a defendant *on the death of such witness*, at another trial" (*ibid.*, 606).

Mr. Starkie, in his work on evidence, 4th London edition, page 409, extends the rules to cases "where the witness is dead for all purposes of evidence, as where diligent search has been made for him and he cannot be found, or where he resides in a place beyond the jurisdiction of the court." but makes no pretense to lay down this rule as, in any sense, applicable to *criminal cases;* the three decisions by which the text is supported—an anonymous case from Godbolt, 326; Benson v. Olive, 2 Strange, 920, and Lord Altham v. Earl of Anglesey, Gilb. Eq. Cas., 16, 18—are essentially civil cases.

If the language of Mr. Sarkie's text could reasonably be construed as applicable indifferently to both civil and criminal cases, then it would be opposed to the opinion of all other English writers on the law of evidence.

But as a matter of fact Mr. Starkie has not been unmind-

ful of the radical difference which marks the distinction between the rule and the practice in the two classes of cases. At page 482 of the second volume of his *Treatise of the Law of Evidence*, the perspicuity of this eminent commentator forbids all misconception. There he makes the following announcement as to the more extended construction:

> "The admissibility and effect of depositions in civil cases have already been considered; it remains to notice those which are made according to the statutes in criminal proceedings."

We have had occasion to note that the only difference between the statutes of Philip and Mary and the enactment of George IV, c. 65, was that while the former applied to cases of felony only, the latter extended the rule so as to include misdemeanors.

Under the operation of the statute of 7 Geo. 4, Mr. Starkie declared the state of the law in criminal prosecutions to be as follows:

> "To warrant such evidence, it is essential to prove by the justice, coroner, or his clerk, etc., that the depositions contain the substance of the information on oath. It is not necessary to prove that the depositions were signed by the witnesses.
>
> "It must also be previously proved that the witness is *dead;* or that he *has been kept away by the practices of the prisoner;* or as *has been said,* that he is *unable to travel.* It seems, however, to be very doubtful whether the mere casual and temporary inability of the witness to attend in a criminal case, be sufficient ground for admitting his deposition, which affords evidence of a nature much less satisfactory than the

testimony of the witness examined *viva voce* in court, and which might be procured at another time if the trial were to be postponed. It is true the prisoner has had the power to cross-examine the witness, but this was at a time and under circumstances very disadvantageous to the prisoner. There are indeed many old cases in which great abuse has been practiced in the reading of depositions against prisoners, although the deponents might have been produced; but these instances occurred in bad times, when little regard was paid to the rules of evidence, or indeed to any other laws. In Lord Morley's case it was held that *it was not sufficient* to show that endeavors had been used to *find the witness*, and that *he could not be found.*"

2 Starkie Ev., 282, 283.

Practically the same observation applies and with equal force to a passage to be found in Section 163 of the first volume of *Greenleaf on Evidence.*

It is there stated:

"But where the testimony was given under oath, in a judicial proceeding, in which *the adverse litigant* was a party, and where he had the power to cross-examine, and was legally called upon so to do, the great and ordinary test of truth being no longer wanting, the testimony so given is admitted, after the decease of the witness, in any subsequent *suit* between the same parties. It is also received, if the witness, though not dead, is out of the jurisdiction, or cannot be found after diligent search, or is insane, or sick, and unable to testify, or has been summoned, but appears to have been kept away by the adverse party."

The decisions cited in support of the text are all adjudications in civil actions, and when applied to these the rule

is correctly expounded. Besides Godb., 326, and Rex v. Eriswell, 3 T. R., 707, 721, per Lord Kenyon, [Long v. Davis, 18 Ala., 801; Covanhovan v. Hart, 21 Penn., (9 Harris) 495], the other references are to Buller, N. P., 239 and 242, and 1st Stark., Ev., 264).

On turning to Sir Francis Buller's *Nisi Prius*, it becomes manifest, from a mere inspection of the passage, that all which appears on pages 239 and 240 of the work is intended to be restricted to an exposition of the course of the common law in *civil actions*. This fact is manifest from the declaration at page 242, set out in these terms:

> "And by 1 and 2 P. & M., c. 13, and 2 and 3 P. & M., c. 10, justices of the peace shall examine of persons brought before them for felony, and of those who brought them, and certify such examination to the next gaol delivery; but the examination of the prisoner shall be without oath, and the others upon oath, and these examinations shall be read against the offender upon an indictment, if the witnesses be *dead*."

In U. S. v. Angell, 11 Fed. R., 41, 42, it was expressly held that Mr. Greenleaf's observations are meant to apply only to civil cases.

To the comments already made upon the pretended authority of 1st Starkie's Evidence, 264, we have nothing to add.

Joseph Chitty, Esq., whose invaluable work on *Criminal Law* was published in 1816, at a time when the statutes of Philip and Mary were yet in force, thus announces the rule of evidence invoked in this case:

"Before the statutes of Philip & Mary, depositions thus taken before justices of the peace, in the county where a felony was committed, *were not admissible in evidence even when death or some absolute necessity prevented the witness from attending.* And, even now, they cannot be received on the trial, without first proving on oath to the satisfaction of the court, that the deponent is *dead,* or *not able to travel,* or that he is *kept away by the means and contrivance of the prisoner.* It must also be shown that the documents produced in evidence were the same, without alteration, as those which were sworn before the magistrate." (Chitty's Criminal Law, vol. 1, pp. 80, 81.)

Mr. Peake, in his work on Evidence, pages 63, 64, originally published in 1801, holds that, in criminal cases, depositions taken by virtue of the statutes 1 and 2 Ph. and M., c. 13, and 2 and 3 Ph. and M., c. 10, may be read in evidence at the trial *only* in the event that the deponent *died* before the trial. He draws a distinction between these depositions and depositions taken before a *coroner,* in which latter case the exceptions are extended to "*death* or *absence beyond sea,* of the witnesses, and where there are reasons to believe that *the prisoner sent them away.*"

Mr. Phillips, in his treatise on the *Law of Evidence,* vol. 1, 6 Am. ed., Cowen & Hill's notes, page 337, in respect of evidence given on a former trial, recognizes but two exceptions to the general rule as to hearsay: 1, the testimony of a witness, since *deceased,* who has been examined upon oath on the trial of a former action between the same parties, and where the point in issue was the same as in

the second action; and, 2, where a person who had been sworn on a former trial between the same parties on the same issue, and subpœnaed to appear as a witness on the second trial, did not appear in obedience to the writ, *having been kept away by the contrivance of the adverse party.*

The only exceptions recognized in England prior to the passage of the Victorian statute are thus enumerated by Mr. Archbold:

> "The statutes relating to the examination of witnesses against a prisoner before a justice of the peace, previously in force, contained no such enactment as the above (11-12 Vict., c. 42), and yet it was determined in many cases, and well recognized as a rule of the common law, that in all cases of examinations of witnesses in cases of felony under those statutes, in the presence of the accused, and where he had the opportunity to cross-examine them, the deposition of a witness might be read against the accused upon his trial, if the witness were then *dead* or *bed-ridden,* and *not likely to be ever able to attend at the assizes,* or *unable to travel,* or had become *insane,* or *was kept out of the way by or on behalf of the prisoner.* And it is probable that, although the cases of death and inability to travel from illness alone are expressly stated in the statute as those in which the deposition of a witness may be read against a prisoner on his trial, it may be holden that such depositions may also be read in evidence if the witness be bed-ridden, though otherwise not in ill-health, or if he have become insane, or if he be kept out of the way by the prisoner, or by some person on his behalf, at the time of the trial."
>
> Archbold's Criminal Prac. and Plead., vol. 1, Waterman's notes, page 480, marginal page 148.

Mr. Edmund Powell, in his treatise on the *Practice of the Law of Evidence,* at pages 256-267, under the heading of "Depositions in Criminal Cases," says:

> "At common law, depositions taken in the presence of a prisoner before a magistrate, and signed by the latter, were generally evidence against the prisoner on his trial if it appeared that he had had an opportunity of cross-examining the witness, and that the witness at the time of trial was either *dead,* or *permanently unable to travel, owing to illness,* or that *he had been kept out of the way by the prisoner, or by some one on the prisoner's behalf,* in order to prevent him from giving evidence against him."

After noting that the admissibility of these depositions is now subject to the 11 and 12 Vict., c. 42, s. 17, he sums up that statute as requiring:

> "1. That it (the deposition) was taken in the presence of the prisoner, and that he either cross-examined, or had an opportunity of cross-examining, the deponent.
>
> "2. That it has been signed by the witness and also by the magistrate.
>
> "3. That it was made on oath by the witness, or on affirmation, in such cases only in which an affirmation is allowed.
>
> "4. That the deponent is either dead, or so ill as not to be able to travel."

Having next recited the predicates which are to be distinctly proved, and the manner of their proof, he proceeds:

> "It is to be observed on the last condition, (4) that it does not contain all the circumstances in which a

deposition is generally admissible. Thus, *before* the statute, the deposition was received at common law, not merely on proof that the deponent was either *dead* or *so ill as to be unable to travel,* but if he were proved to have become *permanently insane,* or to be *actually insane* at the time of trial with a possibility of recovery. So it neither was nor is necessary to show that the illness under which a deponent is suffering, is of a permanent, or of more than a temporary nature. This latter position is doubted by Mr. Phillips, but apparently on insufficient grounds. It is manifestly the intention of the statute that the deposition should be received if the deponent be suffering under an actual and present physical inability to travel, however temporary it may appear to be; and it is the daily practice of the court to admit depositions on proof of this fact. But where the illness of the witness is proved to be of a very transitory nature, the judge may and will, in his discretion, postpone the trial until he recover; and this is the proper course whenever such postponement does not clearly clash with public convenience.

"But the illness must be real and serious, and there must either be a physical incapability of locomotion, or a probability that it might dangerously affect the witness's health. It is desirable, when it is possible, to prove this fact by a medical attendant, but it may be proved by any one who has seen and examined the deponent recently. The court will inquire scrupulously and even suspiciously into all these circumstances, before receiving the deposition; and will reject it when the alleged illness appears to be not dangerous or serious enough to excuse the absence of the deponent. Thus, at the Salisbury spring assizes, 1853, Crompton, J., held that, the fact of a woman being within a *month* of her confinement was insufficient, in her absence, to render her deposition admissible. But immediately after, at Exeter, the same learned judge considered that it might be received when it appeared,

in such a case, that the woman was expecting *every hour* to be confined.

"It is also decided that, as before the statute, a deposition will be received if the deponent be proved *to have been kept out of the way and prevented from appearing at the trial, by the act of the prisoner, or by collusion with him or his friends.* This was expressly decided in R. v. Scaife, when the deponent was kept out of the way by the prisoner's agents; but it is necessary to create by evidence a reasonable presumption that the prisoner's agents have been authorized or sanctioned by him to procure the absence of the witness. But in such a case the deposition is evidence only against the prisoner who procured the absence of the deponent; and not against other prisoners in the same indictment who are not implicated in the collusion.

"Unless the absence of the witness be accounted for *in some one of these ways,* his deposition cannot be received, because it will retain all its original and unsatisfactory incidents as *hearsay evidence.*"

In this connection, Mr. Roscoe, in his work on *Criminal Evidence,* vol. 1, page 104, lays down the rule to be:

"Depositions are admissible as substantive evidence at common law, should the witness be either *dead,* Hale P. C., 305; R. v. Westbeer, Lea C. C., 12; R. v. Bromwich, 1 Lev., 180; Sal. 281; B. N. P., 242; or be in such a state as *never to be likely to be able to attend the assizes;* R. v. Hogg, 6 C. & P., 176, 25 E. C. L.; R. v. Wilshaw, Carr. & M., 145, 41 E. C. L.; or if the witness *be kept away by the practices of the prisoner* (R. v. Guttridge, 9 C. & P., 471, 38 E. C. L.)"

After reciting the substantial provisions of 11 and 12 Vict., c. 42, s. 17, which now govern in England the admissibility of depositions, this author proceeds:

"None of the previous statutes ,1 & 2 P. & M., c. 13; 2 & 3 P. & M., c. 10; 7 Geo. 4, c. 64) contained any directions as to *when* the depositions should be considered admissible. It will be observed that only two cases are mentioned in the above statute, 'where the witness is dead, or so ill as not to be able to travel.' It is not said in the statute that the deposition would be admissible if the witness were kept out of the way by the procurement of the prisoner, a case well established at common law. (See Tayl. on Ev., p. 465, 6th ed.) However, in R. v. Scaife, 2 Den. C. C., 281; 17 Q. B., 208, where the prisoner was indicted together with Thomas Rooke and John Smith for larceny, evidence was given that by the procurement of Smith one of the witnesses for the prosecution had been kept out of the way, and her deposition was tendered; the evidence was admitted to be receivable as against Smith, but it was said that it was no evidence against Scaife and Rooke. The case came before the Court of Queen's Bench, and it was held that the learned judge ought to have told the jury that the evidence applied to the case of Smith only, and not to that of either of the other prisoners. Incidentally, therefore, the admissibility of the depositions as against a prisoner who has himself procured the absence of a witness, is recognized by this case.

"There does not appear to be any *criminal case* in which the depositions have been admitted on the ground of the witness being *insane* either 'before or since' the statute. In *civil inquiries* this has been considered a good ground of admission (R. v. Eriswell, 3 Term Rep., 720); and it is said in R. v. Marshall, Carr. & M., 147, that Coltman, J., thought it a good ground in *criminal cases* also. It is not a sufficient ground of admission that the witness cannot be produced *on account of his absence in a foreign country.* R. v. Austen, 25 L. J., M. C., 48" (*ibid.*, 107).

To the same effect is the case of Thatcher and Waller, prosecuted for murder, in which the deposition of a witness taken before the *coroner* who, at the time of the trial, had gone *beyond the seas,* was permitted to be read in evidence, but in which the judges with the exception of the chief justice were all of opinion that if the deposition had been taken *before a magistrate* it could not have been read (Powell's ed. of Sir Thos. Jones' cases, London ed., 1695). This case is cited as authority in Buller's N. P. and by Starkie at page 385 of the second volume of his work on Evidence.

That eminent text-writer, Sir William Oldnall Russell, in his accepted work on *Crimes,* vol. 3, page 464, refers to the subject-matter of this discussion as follows:

> "As examinations and depositions before magistrates originate from the same acts of Parliament, and are in some respects guided by the same decisions, it may be proper to consider the latter immediately after the former. From what has already been mentioned respecting the examinations before magistrates, it has appeared that by the 1 & 2 P. & M., c. 13, and 2 & 3 P. & M., c. 10, justices of the peace were enabled and directed to take the depositions of witnesses in cases of felony; and that by the 7 Geo. 4, c. 64, these statutes were repealed and re-enacted with an extension to misdemeanors, and we have seen that the 7 Geo. 4, c. 64, is repealed so far as relates to the taking of examinations and informations against persons charged with felonies and misdemeanors, by the 11 & 12 Vict., c. 42. s. 34."

After setting out in terms the seventeenth section of 11

and 12 Vict., c. 42, which prescribes the manner of taking such testimony and the circumstances under which it is admissible in evidence, Sir William Russell continues:

> "Although there was nothing in the former statutes providing that the depositions taken under them should in any case be evidence, yet from the construction of *the two former* by the highest authorities, and upon general principles of evidence, it was considered as *a settled rule,* that if it were proved satisfactorialy to the court that the witness was *dead,* or that he *had been kept away by the practices of the prisoner,* his depositions might be given in evidence on the trial of an indictment, provided the depositions were duly taken upon oath in the presence of the prisoner, when charged before a magistrate. And *it has been said* that if a witness was prevented from attending by *sickness,* or *was unable to travel,* his deposition might be given in evidence. But it was afterwards decided that if a witness were too ill to attend the trial, but there was a probability that he might recover, his deposition was not admissible. The prosecutrix was so near her confinement as to be unable to attend at the assizes, and it was proposed to prove her deposition before the magistrate, and 1 Hale, 586, Kel., 55, were relied upon. Patteson, J.: 'That has been doubted by *Mr.* Starkie, and I think the evidence is not admissible.' The new statute has, however, made the deposition admissible in all cases where the witness is 'so ill as not to be able to travel.' "
>
> 3 Russ. on Cr., 466.

Mr. Herbert Broom, M. A., author of a selection of "Legal Maxims," and, when living, reader in common law to the Inns of the court, in his *Commentaries on the Common Law,* pages 1001, 1002 (81 Law Library, p. 647), defines the rule in these words:

"Passing over the above-mentioned and some other rules as to the admissibility of evidence, which are peculiarly applicable in criminal inquiries, I may observe, in the words of Eyre, C. B., that, although 'the *most common* and ordinary species of legal evidence consists in the depositions of witnesses taken on oath before the jury, in the face of the court, in the presence of the prisoner, and received under all the advantages which examination and cross-examination can give,' besides this kind of proof and certain species of hearsay evidence (some whereof have been alluded to), which are, for various reasons, admitted by law;—the examination of a prisoner and the depositions of the witnesses who may be produced against him, taken officially before a justice of the peace by virtue of the statute law, may, under certain circumstances, be substituted for *viva voce testimony*. As to the admissibility, accordingly, and use of the depositions and statements of the accused as evidence at his trial, a few remarks may here, by reason of the practical importance of the subject, conveniently be offered. The 11 & 12 Vict., c. 42, s. 17, provides that the deposition, duly taken in conformity to the act, of any witness, who, at the time of the trial, may be dead, or 'so ill as not to be able to travel,' may be read as evidence in such prosecution, if proved to have been taken in the presence of the accused, and if it be shown that he or his counsel or attorney had a full opportunity of cross-examining the said witness; and further, if the deposition purport to be signed by the justice—by or before whom the same purports to have been taken—no further proof of the deposition being requisite, 'unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same.'

"Besides being receivable in the event of the death or illness of a witness, the case of Reg. v. Scaife, shows also, that, where the prisoner or one of the prisoners (if there be several in the indictment) has resorted to

a contrivance to keep a witness out of the way, his deposition will be admissible as against that party only who procured his absence. But no case has been decided that a deposition receivable *merely because the witness could not be found,* and on principle this would appear not to be so. And even in the case of illness of a witness, his deposition will be admissible in evidence against the accused only where the charge preferred at his trial is the same as that made before the committing magistrate, or, if not technically the same, where the prisoner has had full opportunity of cross-examining the witnesses called against him."

Mr. MacNally, in his work, *Rules of Evidence on Pleas of the Crown,* under the title of "In what cases the examinations or the declarations of prisoners, and the information of witnesses, taken out of court, whether before the coroner or justice of the peace, may be read in evidence against a prisoner on his trial, under the rules of the common law, or pursuant to statutes," lays down the practice as to depositions before a coroner after this manner:

"Rule the Third.

"That in case any of the witnesses which were examined before the coroner, were *dead, or unable to travel,* and oath made thereof, that then the examination of such witness, so dead, or unable to travel, might be read, the coroner first making oath that such examinations are the same which he took upon oath, without any addition or alteration whatsoever (7 *St. Tr.,* 421; *Kelyng,* 55 *S. C., ante ca., 6 p. 37*).

"Rule the Fourth.

"That in case oath should be made that any witness, who had been examined by the *coroner,* and was then

*absent,* was detained by the means or procurement of the prisoner, if the court be satisfied by the evidence they have heard, that the witness was detained by the means or procurement of the prisoner, then the examination might be read, but whether he was detained by the means or procurement of the prisoner was matter of fact (*ibid.*).

"RULE THE FIFTH.

"That if a witness, who is examined by the *coroner,* be *absent,* and oath is made that the prosecutors have used all their endeavors to find him, that is not sufficient to authorize the reading of such examination (*ibid.*).

"These rules are cited, and fully adopted by *Hawkins,* and other authorities (2 *Hawk. P. C. ca.,* 46; 2 *Hale P. Cr.,* 284; *Sum.,* 262, 263; *Kelyng,* 55; 1 *Lev.,* 190; 2*Keb.,* 19; *Dalt.,* 111, 112, 113).

"On the trial of Lord Morley, the special point on which the *judges* had formerly resolved arose.

"Mr. Solicitor General *French* desired the depositions of some witnesses, taken before the coroner, who were since dead, to be read, which the prisoner opposed, desiring that no evidence might be given against him, but face to face.

"The lord high steward (Lord *Clarendon,* chancellor) demanded the opinion of the *judges,* who by *Kelyng,* C. J., answered, that upon proof made that the witnesses were dead, and oath by the coroner that the depositions were unaltered, they ought to be read. Which was done (7 *St. Tr.,* 424).

"Maynard, serjeant, desired that the depositions of a material witness, taken at the coroner's inquest, *who had now absented himself, so that they could not find him,* might be read.

"*Lord Morley,* the prisoner, opposed it, and the opinion of the *judges* being required, the *lord chief*

*justice* answered, that if the court upon any evidence were satisfied, that the witness was withdrawn *by the procurement of the prisoner,* the deposition ought to be read, *otherwise not*—whereupon,

"*Thomas Hardy deposed,* that *Thomas Snell,* his apprentice, was lately run away from him, and that his fellows said, he told them before he went away, that Lord *Morley's* trial was to be shortly, but he would not be there.

"The court not thinking this evidence sufficient, the depositions *were not read* (*ibid*)."

As to depositions *before magistrates,* Mr. MacNally (on page 292 of his work), makes this declaration:

"Rule the Ninth.

"Though justices of peace cannot hear and determine treason, by virtue of their commission of the peace, nor take an indictment of that offense, yet they may receive examinations and informations on charges of treason of the parties brought before them, and certify them as directed by the statute of *Phil. and Mary,* 1 *Hale P. C.,* 305.

"Rule the Tenth.

"And such informations and depositions of a witness, being taken in writing upon oath, administered by a justice of the peace as they ought to be, and being certified to the gaol delivery, may be read in evidence against the defendant, not only if the informant be *dead,* but if he be *unable to travel,* and sworn so to be (1 *Hale P. C.,* 305; 2 *Hale P. C.,* 284; *vide similar rule in respect to informations before the coroner; ante,* 285)."

Judge Taylor, whose treatise on evidence is approved by the English and accepted by the American courts, in dis-

cussing the question under consideration, at section 474 says:

> "In *criminal proceedings* a similar latitude is not allowable at common law, and the deposition of a witness, whether taken before a magistrate or coroner, will not be rendered admissible on mere proof that the witness himself *cannot be found after diligent search.* Neither will it be received, though satisfactory proof be given that the witness was not absent from any intention to defeat justice, but that, being a foreigner, he had, since the prisoner was committed for trial, returned to his own country, and was at the time of the trial *resident abroad.* This kind of evidence has also been rejected in America, both where the witness could not be found within the jurisdiction, but was reported to have gone to an adjoining State, and where he was proved to have left the State, after being summoned to attend at the trial."

In section 478 of his work, the learned author further says:

> "The proposition that, if a witness be *kept out of the way* by the adversary, his former statements on oath will be admissible, rests partly on the authority of several decisions, both in the civil and criminal courts; partly on the analogies furnished by one or two statutes; but chiefly on the broad principle of justice, which will not permit a party to take advantage of his own wrong. In a case where three prisoners were indicted for felony, and a witness for the prosecution was proved to be absent through the procurement of one of them, the court held that his deposition might be read in evidence as against the man who had kept him out of the way, but that it could not be received against the other two men."

Sir James Fitzjames Stephen's *Digest of the Law of*

*Evidence,* is described in the first edition of the *American and English Encyclopedia of Law* to be "universally accepted as containing the most clear and concise statements of the law of evidence extant." This learned judge lays down the rule in this language:

> "Evidence given by a witness in a previous action is relevant for the purpose of proving the matter stated in a subsequent proceeding, or in a later stage of the same proceeding, when the witness is *dead* or is *mad*, or so ill that he will probably *never be able to travel*, or is *kept out of the way by the adverse party*, or in *civil*, but *not*, it seems, in *criminal, cases*, is *out of the jurisdiction of the court*, or, perhaps, in civil, but *not* in criminal, cases, when he *cannot be found*" (Stephen's Digest of the Law of Evidence, pp. 76-'7).

And now we turn to those American writers on the law of evidence who from their study of the subject, coupled with their long experience in the profession which they honor by their works, are entitled to speak with the voice of authority. These announce the principle in language as broad and comprehensive as that for which we contend; and we find the rule laid down in all the text books, that the right of confrontation with the witnesses in criminal cases is subject only to the qualifications already enumerated.

The authoritative announcement of the fundamental right of confrontation by Mr. Cooley, repeatedly approved by this high tribunal, is in these terms:

> "The testimony for the people in *criminal cases* can only, as a general rule, be given by witnesses who are present in court. The defendant is entitled to be con-

fronted with the witnesses against him; and if any of them be absent from the Commonwealth, so that their *attendance cannot be compelled,* or if they be *dead,* or have become *incapacitated to give evidence,* there is *no mode* by which their statements against the prisoner can be used for his conviction. The exceptions to this rule are of cases which are excluded from its reasons by their peculiar circumstances; but they are far from numerous. If the witness was sworn before the examining magistrate or before a coroner. and the accused had an opportunity then to cross-examine him, or if there were a former trial on which he was sworn, it seems allowable to make use of his deposition, or of the minutes of his examination, if the witness has since *deceased,* or is *insane,* or *sick and unable to testify,* or has been summoned but appears to have been *kept away by the opposite party.*"

Cooley's Const. Lim., page 387.

Dr. Wharton, in his work on *Criminal Evidence,* section 229, thus announces the rule:

"Proof of mere disappearance of the original witness is not by itself enough to admit such testimony if by due diligence the witness's attendance could have been secured; nor in *criminal trials* is such testimony made admissible by the fact that the witness, since the examination, has *left the jurisdiction,* and is not amenable to process. But in such cases the testimony of a former witness, corruptly or otherwise unlawfully *kept from the court* by the party against whom he is called, it has been held may be in like manner reproduced, the defendant in the former trial having had the opportunity of cross-examining the witness." * * *

See also Wharton Plead. and Prac., sec. 546.

Dr. Bishop, in his commentary on the law of *Criminal Procedure,* asserts that by a rule of the common law, an-

cient and modern, the evidence against an accused in a criminal trial "must be delivered personally and orally before the same triers who are to pronounce him guilty or not guilty." Under the caption *Testimony on Prior Proceedings,* he observes:

> "To the latter branch of this rule, there is an exception growing out of necessity; namely, if there has been a prior proceeding involving the same issue between the same parties, conducted regularly in pursuance of law, and therein the defendant had the opportunity to cross-examine the witnesses against him, not otherwise—then, if a witness has *died,* or, says Archbold, if he is 'insane (though the insanity were of a temporary nature), or if it appeared satisfactory to the court that he was kept out of the way, or if he was bed-ridden or so ill as to be unable to travel,' (but not if simply he cannot be found, or by most opinions if only he is absent from the State or otherwise beyond the reach of process), what he testified to at the former hearing may be shown in evidence against the defendant in the present one."
>
> 1 Bish. Cr. Proc., § 1195.

Mr. Underhill, in his work on *Criminal Evidence,* section 262, page 320, declares:

> "It was formerly doubted, even in civil cases, whether the testimony of a living witness who was absent merely, would be received in trial. Though the authorities sustain the rule by which in civil suits the testimony of an absent witness is received not only in case of death, but where he is incompetent by insanity or illness, or mere absence, the criminal courts always hesitate, in the absence of a permissive or mandatory statute, to admit such evidence unless the death or insanity of the witness is shown.

"The mere fact that the witness is *sick* or *out of the jurisdiction,* or that his *whereabouts are unknown* so that he cannot be reached by a subpœna, is *not enough.* The authorities are not wholly harmonious, though usually now, by statute, such evidence is admissible."

Mr. Rapalje, in his work on *Criminal Procedure,* section 278, construes the exception in this manner:

"Again, the evidence of a witness, since *deceased,* on a former trial of the same case, may be proven on a subsequent trial. His deposition then taken may be introduced either by the State or the accused. Such proof does not violate defendant's constitutional right to 'meet the witness face to face.' And his testimony then given may be proved, if necessary, by the testimony of one who was present and heard it, who may state its substance, if unable to repeat its words. But such testimony must be placed before the jury as nearly as possible as the deceased witness would have placed it, if living and present. The fact that a witness on such previous trial, who is still living, is *absent from the State,* or *beyond the territorial jurisdiction of the court,* is *not generally ground* for the admission of his previous testimony, unless his absence is occasioned by the defendant."

The meaning of the expression "is not generally ground for the admission of his previous testimony," here employed, is made clear by the expressions which follow:

"But proof of what a living witness swore to on a former trial has been admitted, in order to identify the two charges of crime, in aid of a plea of former jeopardy. And such proof of the former testimony may be admitted where the accused *waives* his right to be confronted by the witnesses against him."

In Mr. McKelvey's book on Evidence, under the subhead "Disabilities which are recognized," on page 234, it is held:

> "As to criminal cases.
>
> "In criminal cases the disability is confined within narrower limits. The constitutional provisions for the protection of persons charged with crime, doubtless, are responsible for this. The provision is common which provides 'that in all criminal prosecutions the accused has the right to meet the witness against him face to face,' and while it is held that, where evidence has once been given in court by the witness personally in the presence of the accused, it is not a violation of this provision to allow it to be repeated in case of the *death* of the witness, still the influence of the provision is felt in the disinclination to extend the rule to many other disabilities which are recognized in civil cases. Absence from the jurisdiction is held in some of the States to be sufficient, in criminal as well as in civil cases."

Treating of the testimony of the accused in any previous judicial or official investigation, and especially of the testimony of an absent witness on a former trial, Mr. Abbott, in his *Trial Brief in Criminal Cases,* asserts:

> "The fact that a witness who testified on a former trial of the accused on the same charge, is *sick* or *beyond the jurisdiction,* or his *residence or whereabouts is unknown,* is *not ground* for allowing his former testimony to be proved as evidence either for or against the accused.
>
> "The fact that he is *dead,* or incapacitated by *insanity,* is *sufficient ground.*
>
> "The fact that he is *absent by procurement* of either party is sufficient ground for allowing it as against such party."

Neither the commentators on the law of evidence, nor the courts called upon to expound it, have shown any inclination to lend a willing ear to the plea of *convenience.* Their attitude in this connection is clearly and convincingly illustrated in the language of Mr. Justice Grose, reported in *King v. Eriswell,* 3 Term, 711, to this effect:

> "But it may be said that it is in this case wise and discreet to depart from the general rule of evidence, and in this instance to admit hearsay evidence of a fact, or evidence on oath administered in the absence of the adverse party. I dread that rules of evidence shall ever depend upon the discretion of judges; I wish to find the rule laid down, and to abide by it. In this case I find the general rule; I find no decided authority that forms an exception to it, and nothing but a clear uncontrovertible decision upon the point, and not the concession of counsel or the *obiter dictum* of a judge, ought to form an exception to a general rule of law framed in wisdom by our ancestors, and adopted in every case except where the exception is as ancient as the rule."

The substantial and fundamental right of confrontation is subject to but four exceptions: first, where the witness is dead; second, where the witness is so ill that it is unlikely that he will ever be able to appear in court; third, where the witness has become insane; fourth, where, through the procurement or connivance of the accused, the witness has been prevented from attending. In each of these instances, the absent witness must previously have testified under oath in the presence of the accused, and a predicate for the introduction of the secondary evidence must be established to the satisfaction of the court.

These are the only exceptions, known to the common law, which limit the otherwise absolute right of confrontation. The first three exceptions result from the necessities of the case; the fourth, from the act of the accused himeslf, and if a substantial right is denied him, it is because he may not profit by his own evil-doing. So that, if he be deprived of the protection which is ordinarily secured to him by the law, it proceeds either from the act of God or his own wrong-doing. In three of the instances, the exception is implied in the grant of the right; in the fourth, the privilege of the accused is surrendered by his own misconduct.

Turning next to the adjudicated cases, we find in the leading case on the subject in the English books, that the question of the absolute right of the accused, within the limitations above recited, to be confronted with the witnesses against him, was at issue before the House of Lords in the year 1666, 18 Charles II. The trial was that of Lord Morley, and all the judges of England were summoned to consider of such things as might in point of law fall out in the trial. There were John Kelyng, lord chief justice of the King's bench; Sir Orlando Bridgman, lord chief justice of the common pleas; Sir Matthew Hale, chief baron of the exchequer; Atkins, Twisden, Tyrell, Turner, Brown, Windham, Archer, Raynsford and Morton, and there:

> "2. It was resolved, that in the case the peers who are triers after the evidence given and the prisoner withdrawn and they gone to consult of their verdict, should desire to speak with any of the judges to have their opinion upon any point of law, that if the lord

steward spoke to us to go, we should go to them; but when the lords asked us any question, we should not deliver any opinion, but let them know we were not to deliver any private opinion without conference with the rest of the judges, and that to be openly done in court, and this, notwithstanding the precedent in the case of the Earl of Castlehaven, was thought prudent in regard of ourselves, as well as for avoiding suspicion, which might grow by private opinions, all resolutions of judges being always done in public."

Lord Morley had been indicted for murder, and a plea made in King's Bench of "not guilty," and he put himself upon his peers. After the admission of partial proof before the House of Lords, Serjeant Maynard desired that the deposition of a material witness taken at the coroner's inquest (who had now absented himself so they could not find him) might be read.

The prisoner opposed it, and the opinion of the judges being required, the lord chief justice delivered the opinion: that if the court upon any evidence were satisfied the witness was withdrawn by the procurement of the prisoner the deposition ought to be read, *otherwise not.* Whereupon,

Thomas Harding sworn, deposed, that Thomas Snell, his apprentice, was lately run away from him, and that his fellows said, he told them, before he went away, that the Lord Morley's trial was to be shortly, but he would not be there. The court not thinking this evidence sufficient, the deposition was *not read* (Howell's Stat. Trials, vol. 6, pp. 776-'7).

The opinion reached by all the judges in England was announced through the lord chief justice in the statement of legal principles which were to guide the course of the triers of the fact. The question being submitted by the lord high steward as to whether the deposition of Snell, the absent witness could be read, the court, speaking through the lord chief justice, said:

> "5. That in case oath should be made that any witness who had been examined by the coroner, and was then absent, was detained by the means or procurement of the prisoner, and the opinion of the judges asked whether such examination might be read, we should answer, that if their lordships were satisfied by the evidence they had heard that the witness was detained by the means or procurement of the prisoner, then the examination might be read, but whether he was detained by the means or procurement of the prisoner was matter of fact of which we were not judges, but their lordships.
>
> "6. Agreed, that if a witness who was examined by the coroner be *absent*, and oath is made that they *have used all their endeavors to find him*, and cannot find him, that is *not* sufficient to authorize the readnig of such examination."

A memorandum of the case and the ruling of the judges on the question submitted is reported in Kelyng's Reports, page 55.

Up to the time of this trial, a ficticious distinction had been established between depositions taken before justices of the peace, and depositions taken before a coroner. The rule as to the first had been that with a proper predicate

laid, the deposition might be read in evidence only in the event that the deponent *died* before the trial; but depositions taken before a coroner might be read in the event of the *death* or *absence beyond sea* of the witness, and where there was reason to believe that *the prisoner sent him away*. (See Peake on Evidence, pp. 63, 64.)

There is no limitation at common law or under the Constitution of the United States, or in the bill of rights of Louisiana, as to the number of times that the accused shall be confronted with the witnesses against him in criminal proceedings. The grant of right is that in *all* criminal prosecutions the accused shall be confronted with the witnesses against him. The frequency with which he is charged, or the frequency with which he is tried on the same charge, can in no manner imperil, diminish or destroy the right. It is suspended, as we have observed, but in two instances: in one by the act of God and in the other by the act of the accused himself.

But it is immaterial, for the purposes of this argument, whether the rule of law be satisfied, or not, by a single confrontation of the witness and the accused, at some time during the proceedings, the question propounded being, under what circumstances the testimony of the absent witness can be taken out of the category of hearsay evidence.

The principle announced in Lord Morley's case was recognized at the trial of Henry Harrison at the Old Bailey for the murder of Andrew Clinch (4 Wm. & Mary, 1692

(Howell's State Trials, vol. 12, page 851), the judges presiding at the trial being Lord Chief Justice Holt, Lord Chief Baron Atkins, and Mr. Justice Neville. In that case, however, the evidence disclosed the fact to the satisfaction of the court that the witness whose deposition was sought to be introduced had been spirited away by the accused, and therefore he was not entitled to the protection accorded him by the English charter of rights—that of confrontation with the witnesses against him.

The doctrine of Lord Morley's case for nearly four hundred years remained unchallenged. The rule was universally accepted and acted upon, and not until during the last century was the question revived for judicial consideration, when the same principle was again announced in language equally clear and decisive.

In the case of Queen v. Scaife, Smith and Rook, which was on an indictment for robbery with violence, removed by certiorari from the Hullborough session and tried before Cresswell at the York assizes, the prisoner, Smith, was defended by one counsel and Scaife and Rook by another. On the part of the Crown, the deposition of one Ann Garnett was tendered in the presence of the prisoners. The witness did not appear at the assizes, and it was proved that due search had been made for her on the part of the prosecution, but that she could not be found. There was evidence also that she was kept away by the procurement of Smith, but this evidence did not implicate the other prisoners.

The reading of the deposition was objected to by coun-

sel for Smith, but the learned judge admitted it, subject to the objection, being of opinion that the procurement by Smith was proved. In summing up, he left Garnett's statement, among other evidence, to the jury, not telling them that the deposition could effect Smith only. The jury found a verdict against Scaife and Rook, and acquitted Smith. A rule *nisi* was obtained at the ensuing term for a new trial, on the ground of improper reception of evidence and misdirection.

The case was argued at considerable length with *reference by analogy to the admissibility of depositions in civil cases.* The colloquium between court and counsel, during the argument, makes it perfectly manifest what the decision would be upon final determination.

> *Lord Campbell, C. J.:* This rule must be made absolute. The prisoner Smith had resorted to a contrivance to keep the witness out of the way; and therefore the deposition was admissible evidence against him; but it was not so against the other two prisoners; and the learned judge, in his summing up, did not make the distinction in favor of these two. Then, a question has been made, whether depositions of a witness who is not dead, or kept away by the prisoner's contrivance, may be received when the witness is not to be found. No case goes so far; and I should be afraid to lay down such a precedent. Receiving evidence of this kind is subjecting the prisoner to prejudice from the statement of a witness whom he has not the advantage of cross-examining *at the trial.*"
>
> "*Patteson, J.*: If there was sufficient evidence that a prisoner had secured the witness' absence, that might let in the deposition as evidence to be heard. But no distinction appears to have been made between

the prisoner against whom the deposition was admissible and those who could not be affected by it."

"*Coleridge, J.:* I always understood, before the late statute, that if a witness was dead or insane, or kept away by the procurement of the prisoner, his deposition was admissible, if properly taken; but that other absences were all under one category, and were not grounds for admitting the evidence. The late act (11 and 12 Vict.) takes one case out of the category, namely that of disability by sickness. But, if a mere unavoidable absence of the witness had been sufficient excuse, that provision would have been superfluous; sickness was an innocent cause of absence, and the absence was necessary. Therefore, this enactment is, *negatively, a strong declaration against the admissi*bility of depositions on the ground here taken."

"*Erle, J.:* There was no evidence of procurement by any prisoner but Smith; and the mere fact that the witness *could not be found* was not sufficient to make her deposition admissible."

The court, after conferring with the Master of the Crown Office made the rule absolute (17 Queen's Bench Rep., 238, 14 and 15 Victoria).

It may be proper to note, in this connection, that the privy council, in reviewing this decision, held:

"..... the court decided, and decided rightly, the only question directly for consideration, namely, that of the reception of evidence and misdirection, and for that alone the decision is properly an authority."

The privy council determined, however, that the granting of a new trial was an important innovation in the practice of the common law, and that "the decision has taken no root in our law, and borne no fruit in our practice."

(4 Moore's Privy Council, N. S., Regina v. Bertrand, 477; *ibid.*, 1st Privy Council, Law Reports, 520).

In Regina v. Guttridge, 9 Carrington & Payne, 473, the doctrine contended for was assumed by Baron Parke as an indisputable proposition of law, elementary and fundamental, for, in summing up to the jury, he said:

> "If it had been proved on the part of the prosecution that Ellen Connelly was kept out of the way by the prisoners, I should have allowed her deposition to have been given in evidence against them. But that is not proved."

As stated by Mr. Roscoe, commenting upon the 11 and 12 Vict., c. 42, s. 17:

> "None of the previous statutes (1 and 2 P. & M., c. 13; 2 and 3 P. & M., c. 10; 7 Geo. 4, c. 64), contained any directions as to *when* the depositions should be considered admissible."

The Victorian statute mentions but two instances: "where the witness is dead, or so ill as not to be able to travel.

Roscoe on Criminal Law, vol. 1, p. 104.

Ann Savage was tried for felony in 1831, at the Stafford assizes, before Mr. Justice Patteson. 7 Geo. 4, c. 64, was the statute then in force. Mrs. Downing, a witness for the prosecution, was so near her confinement as not to be able to attend at the assizes or before the committing magistrate; and it was proved that the prisoner was taken to Mrs. Downing by the magistrate; and a witness stated,

that what Mrs. Downing said in the presence and hearing of the prisoner was taken down in writing.

*Greaves*, for the prosecution, proposed to call the magistrate to prove what was stated by Mrs. Downing in the hearing of the prisoner; and contended, upon the authority of 1 Hale, 586, Kel., 55, that if the witness be unable to travel through illness, the depositions are admissible.

*Mr. Justice Patteson* held:

> "That has been doubted by Mr. Starkie; and I think the evidence is not admissible" (5 Carrington & Payne, 143-'4).

On October 31, 1837, William Hagan was put upon his trial before Mr. Baron Bolland and Mr. Justice Coltman, upon the charge of having feloniously cut and wounded, with intent to murder, one Charles Randyll. The offense having been committed before the 1st of October, the indictment was framed under the old act, 7 Geo. 4, c. 31, and not under the new statute, 7 Will. 4, and 1 Vict. 6, 85.

*Payne*, for the prosecution, then stated that a witness named Dallas, who was examined before the magistrate, had since gone to sea, and could not be produced by him.

*C. Phillips*, for the prisoner, stated that he rested his defense wholly on the evidence of Dallas, who was bound over as a witness for the prosecution; and that if he had known that he was not here he should have applied to the court to postpone the trial. Under these circumstances, he asked his lordship to allow the deposition of Dallas to be read.

*Coltman*, J., was of opinion that it was not admissible in evidence.

*Payne* upon this said, that as he was prosecuting for a public body he would, with his lordship's permission, consent that the deposition should be read.

*Coltman, J.*, was of opinion that with consent it might be done (8 Carrington & Payne, 167-169).

The note to the declaration of Mr. Justice Coltman that in his opinion the deposition would not be admissible in evidence, is as follows:

> "The only circumstances under which the depositions of a witness can be read in evidence are these—either that the witness is dead, or is insane, or that he has been kept away by the practices of the prisoner, or that he is permanently disabled from attending at the trial. A temporary disability is only a ground for postponing the trial. (See Rex v. Savage, *ante*, vol. 5, p. 143, and Rex v. Hogg, *ante*, vol. 6, p. 176, and see Russ., C. & M., p. 660, and Starkie's Evidence, vol. 2, p. 487)."
>
> See, also, Regina v. Farrell, 2 Crown Cases Reserved, 118, and Regina v. Marshall *et als.*, Carrington & Marshman, 147.

The case of *Regina v. Austen* and another came up first for argument on the 24th November, 1855, before Jervis, C. J., Parke, B., White, J., Creswell, J., and Willes, J.; but the argument was not then concluded, and the case was reargued on January 19, 1856, before Pollock, C. B., Alderson, B., Coleridge, Williams, and Willes, JJ. The case is cited in full in the *appendix* to this argument, and is so pertinent as to impel us to specially direct to it the attention of the court.

The substance of the decision is that, upon a trial for felony, it is *no ground for receiving* in evidence a deposition taken before the committing magistrate, under the statute 11 and 12 Vict., c. 42, s. 17, that the witness is a *foreigner and absent in a foreign country* (7 Cox's Criminal Cases, p. 55).

It must be perfectly manifest to one familiar with the history of the bill of rights embodied in the *Magna Charta* and the adjudicated cases in the English courts, that whatever other right may be subject to legislative control and modification, the right of confrontation of the accused with the witnesses against him is one of those substantial and fundamental rights which cannot be disturbed or imperiled, so long as the prohibition against the deprivation of one's life, liberty, or property except by due process of law, finds lodgment, force and efficacy in *Magna Charta* and is protected by the Fourteenth Amendment to the Constitution of the United States.

The right of the accused in all criminal proceedings, subject only to the common law exceptions, to be confronted with the witnesses against him is crystallized in the English decisions, imperishably embodied in the bill of rights of *Magna Charta*, and transmitted to and inherited by the American citizen and preserved inviolate under the protective provisions of the Fourteenth Amendment to the Constitution of the United States, which forbids its denial. The doctrine has been generally, although not uniformly, recognized in this country. That there exists

legislation in some of the States which, outside and beyond the exceptions which we have discussed, has undertaken to authorize the admission of secondary proof because of the absence from the jurisdiction of the witnesses previously examined or for other causes stated in the statutes, and this in some jurisprudence even independent of statute —is a fact which, however reluctantly the admission ought to be made, we concede to be true. But, whether it be legislation or judicial decision, either or both are open to the charge that they operate as an infraction of the substantial and fundamental right guaranteed to all freemen, and—under the test of the judicial analysis, when measured by *Magna Charta* and the Constitution of the United States and of all, or nearly all, of the States—must fall under the ban of unconstitutional legislation and be declared obnoxious to the fundamental principles of free government and republican institutions.

The sixth amendment to the Constitution of the United States embodies the declaration of right that "in all criminal prosecutions the accused shall enjoy the right ..... to be confronted with the witnesses against him." It is true, however, that under the repeated adjudications of this court, fundamental as the proposition is, the operation and effect of this declaration of right contained in the original amendment is limited to the National Government and does not operate upon the States.

This observation is submitted as introductory to the decisions of the Supreme Court of the United States, to which we are about to refer. These decisions, founded

upon the substantial and fundamental right of the accused to be confronted with the witnesses against him in criminal prosecutions, recognize the limitations to which we have adverted, and which are in consonance with the principles of the common law. No other exception to the recognition and enforcement of the right of confrontation is made, and where any has been suggested, as we shall show, it has been promptly and effectually repudiated.

In *Mattox v. United States*, 156 U. S. 240, one of the errors assigned to the action of the trial court was to the admission of the reporter's notes of the testimony of two witnesses at a former trial, who had since *died*. Plaintiff in error contended that the constitutional provision that the accused shall be confronted with the witnesses against him was infringed by permitting the testimony of witnesses sworn upon a former trial to be read against him.

Mr. Justice Brown said:

> "No question is made that this may not be done in a civil case, but it is insisted that the reasons of convenience and necessity which excuse a departure from the ordinary course of procedure in civil cases cannot override the constitutional provision in question.
>
> "The idea that this cannot be done seems to have arisen from a misinterpretation of a ruling in the case of Sir John Fenwick, 13 Howell's State Trials, 537, 579, *et seq.*, which was a proceeding in Parliament in 1696 by bill of attainder upon a charge of high treason. It appeared that Lady Fenwick had spirited away a material witness, who had sworn against one Cook on his trial for the same treason. His testimony having been ruled out, obviously because it was not the

case of a deceased witness, nor one where there had been an opportunity for cross-examination on a former trial, between the same parties, the case is nevertheless cited by Peake, in his work on Evidence (page 90) as authority for the proposition that the testimony of a deceased witness cannot be used in a criminal prosecution. The rule in England, however, is clearly the other way. (Authorities). As to the practice in this country, we know of none of the States in which such testimony is now held to be inadmissible."

In reviewing the question as to the right of the prosecution to introduce the evidence of witnesses since deceased, taken on a former trial, Mr. Justice Brown, after a citation of the leading authorities, held:

"There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards, even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficient in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death had closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an *incidental* benefit may be preserved to the accused.

"We are bound to interpret the constitution in the light of the law as it existed at the time it was adopted, *not as reaching out for new guarantees* of the rights

of the citizen, but as securing to every individual such as he *already* possessed as a British subject—such as his ancestors had inherited and defended since the days of *Magna Charta.* Many of its provisions in the nature of a bill of rights are subject to exceptions, *recognized long before the adoption of the Constitution,* and not interfering at all with its spirit. Such exceptions were obviously intended to be respected."

* * *

Having reviewed the law and the principle controlling the admission of *dying declarations,* and the necessity for admitting them in evidence, applying the principle by analogy to the evidence of witnesses since deceased, the court held that their evidence, upon which error was assigned, was admissible.

In the case of *Kirby v. United States,* 174 U. S., 60, Kirby was indicted, tried and convicted under the statute of 1875, which was an act to punish certain larcenies and the receivers of stolen goods. The evidence administered, as shown by the opinion, was the record and judgment rendered against Wallace and Baxter, resting upon their respective pleas of guilty, and the judgment against King after trial and a verdict of guilty. This was the only evidence offered to establish the fact that Kirby was in possession of property stolen from the Government. With the record of these convictions out of the case, there was no evidence whatever to show that the property alleged to have been received by Kirby was stolen from the United States. Mr. Justice Harlan, who delivered the opinion of the court, said:

"One of the fundamental guarantees of life and

liberty is found in the Sixth Amendment of the Constitution of the United States, which provides that 'in all criminal prosecutions the accused shall ..... be confronted with the witnesses against him.' Instead of confronting Kirby with witnesses to establish the vital fact that the property alleged to have been received by him had been stolen from the United States, he was confronted only with the record of another criminal prosecution, with which he had no connection, *and the evidence in which was not given in his presence.* The record showing the result of the trial of the principal felons was undoubtedly evidence as against *them*, in respect of every fact essential to show *their* guilt. But a fact which can be primarily established only by witnesses cannot be proved against an accused charged with a different offense for which he may be convicted without reference to the principal offender—*except by witnesses who can confront him at the trial, and upon whom he can look while being tried,* whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases. The presumption of the innocence of an accused attends him troughout the trial, and has relation to every fact that must be established in order to prove his guilt beyond reasonable doubt. 'This presumption,' this court has said, 'is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created' (Coffin v. United States, 156 U. S., 432, 459). But that presumption in Kirby's case was in effect held in the court below to be of no consequence; for, as to a vital fact which the Goverment was bound to establish affirmatively, he was put upon the defensive almost from the outset of the trial by reason alone of what appeared to have been said in another criminal prosecution with which he was not connected,

and at which he was not entitled to be represented. In other words, the United States, having secured the conviction of Wallace, Baxter and King as principal felons, the defendant charged by a separate indictment with a different crime—that of receiving the property in question, with knowledge that it was stolen, and with intent to convert it to his own use or gain--was held to be presumptively or *prima facie* guilty so far as the vital fact of the property having been stolen was concerned, as soon as the Government produced the record of such convictions, and without its making any proof whatever by witnesses confronting the deceased of the existence of such vital fact. We cannot assent to this view. *We could not do so without conceding the power of the legislature, when prescribing the effect as evidence of the records and proceedings of courts, to impair the very substance of a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not all of the States composing the Union.*"

After reviewing the English jurisprudence and applying the principles announced in the cases to which the learned justice referred, he concludes by announcing:

"It is scarcely necessary to say that to the rule that an accused is entitled to be confronted with witnesses against him, the admission of *dying declarations* is an exception which arises from the necessity of the case. This exception was well established before the adoption o fthe Constitution, and was *not intended to be abrogated*. The ground upon which such exception rests is that from the circumstances under which *dying declarations* are made, they are equivalent to the evidence of a living witness upon oath—'the condition of the party who made them being

such that every motive to falsehood must be supposed to have been silenced and the mind to have been pelled by the most powerful considerations to tell the truth' (Clyde Mattox v. United States, 146 U. S., 140, 151; Cooley's Constitutional Limitations, 318; Phillip's Evidence, chapter 7, sec. 6).

"For the reasons stated, it must be held that so much of the above act of March 3rd, 1875, as declares that the judgment of conviction against the principal felon shall be evidence in a prosecution against the receiver that the property of the United States alleged to have been embezzled, stolen or purloined, is in violation of the clause of the Constitution of the United States declaring that in all criminal prosecutions the accused shall be confronted with the witnesses against him. Upon this ground the judgment must be reversed and a new trial had in accordance with law."

In the case of *Murray v. Louisiana*, 163 U. S., p. 101, a number of errors were assigned to the action of the trial court and to the decision of the Supreme Court of Louisiana; and in passing upon one of the assigned errors, Mr. Justice Shiras, delivering the opinion of the court, said:

"A more serious question is presented by an exception to the action of the trial court in permitting to be read the evidence of one King Jones, which had been taken in the presence of the accused in open court at a prelimianry hearing, and read to and signed by the witness. The reason given by the district attorney for the use of the deposition was that after due diligence he was unable to procure the attendance of the witness, who was not within the jurisdiction of the court. The record, however, disclosed that the bill of exceptions to the allowance of this evidence was not presented for signature to the judge until March 14th, 1895, two weeks after sentence was rendered,

> and after a new trial had been refused and an appeal allowed. No error was assigned in the Supreme Court of Louisiana, to the admission of this evidence, nor is it made the subject of assignment in this court. Neither does the record disclose the nature or effect of the testimony so admitted. In the absence of a bill of exceptions, disclosing at least the substance of the evidence, and of an assignment of error, we are permitted to suppose that the evidence was trivial, and that it did no injury to the defendant. We certainly have nothing in this record which would authorize us to *convict* the Supreme Court of Louisiana of any error in that behalf."

Beween the lines of this opinion, it is perfectly manifest that if a bill of exceptions had been presented in due time and if there had been a proper assignment of error in the Supreme Court of Louisiana, or even in the Supreme Court of the United States, upon the admission of King Jones' deposition, and its materiality had been disclosed in the assignment, *a reversal would inevitably have followed.*

In *Reynolds v. United States*, 98 U. S., 145, one of the errors assigned and insisted upon as a ground for the reversal of the judgment of the Supreme Court of the Territory of Utah, was that the testimony of Amelia Jane Scofield, given at a former trial for the same offense but under another indictment, was improperly admitted in evidence: the contention of plaintiff in error being that under the Constitution he was entitled to be confronted with the witnesses against him, and that this right was not subject to limitation or qualification. The question was fully argued and well considered by the learned Chief Justice, who de-

livered the opinion of the court. Recognizing the substantial and fundamental right of the accused to confront his accusers and the witnesses against him, the court held that that right was subject to limitation where the accused had been instrumental in placing the witness beyond the court's process, and that, in consequence of his own wrong, he had no right to complain of the invasion of his constitutional privilege. But, in this respect, that was the sole limitation to be placed upon the constitutional right of the accused. Before reaching this conclusion, a careful review was made of the early English authorities.

In delivering the opinion of the court, Mr. Chief Justice Waite said:

> "The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him, but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.
>
> "In Lord Morley's case (6 State Trials, 770), as long ago as the year 1660, it was resolved in the House of Lords 'that in case oath should be made that any witness, who had been examined by the coroner and was then absent, was detained by the means or pro-

curement of the prisoner, and the opinion of the judges asked whether such examination might be read, we should answer, that if their lordships were satisfied by the evidence they had heard that the witness was detained by means or procurement of the prisoner, then the examination might be read, but whether he was detained by means or procurement of the prisoner was matter of fact, of which we were not the judges, but their lordships.' This resolution was followed in Harrison's case (12 *id.*, 851), and seems to have been recognized as the law in England ever since. In Regina v. Scaife (17 Ald. and El. N. S., 242) all the judges agreed that if the prisoner had resorted to a contrivance to keep a witness out of the way, the deposition of the witness, taken before a magistrate and in the presence of the prisoner, might be read. Other cases to the same effect are to be found, and in this country the ruling has been in the same way (Drayton v. Wells, 1 Nott & M. (S. C.), 409; Williams v. The State, 19 Ga. 403). So that now, in the leading text books it is laid down that if a witness is kept away by the adverse party, his testimony, taken on a former trial between the same parties upon the same issues, may be given in evidence (1 Greenl. Evid., sect. 163; 1 Taylor, Evid., sect. 446. Mr. Wharton (1 Whart. Evid., sect. 178) seemingly limits the rule somewhat, and confines it to cases where the witness has been *corruptly* kept away by the party against whom he is to be called, but in reality his statement is the same as that of the others, for in all it is implied that the witness must have been *wrongfully* kept away. The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong; and, consequently, if there has not been, in legal contemplation, a wrong committed, the way has not been opened for the introduction of the testimony. We are content with this long-established usage, which, so far as we have been able to discover, has rarely been de-

parted from. It is the outgrowth of a maxim based on the principles of common honesty, and, if, properly administered, can harm no one.

"Such being the rule, the question becomes practically one of fact, to be settled as a preliminary to the admission of secondary evidence. In this respect it is like the preliminary question of the proof of loss of a written instrument, before secondary evidence of the contents of the instrument can be admitted. In Lord Morley's case (*supra*), it would seem to have been considered a question for the trial court alone, and not subject to review on error or appeal; but without deeming it necessary in this case to go so far as that, we have no hesitation in saying that the finding of the court below is, at least, to have the effect of a verdict of a jury upon a question of fact, and should not be disturbed unless the error is manifest."

Here, again, the substantial and fundamental right of the accused to confrontation with the witness was recognized, subject to the limitations found in all the books.

In *Motes v. United States*, 178 U. S., 459, under a charge of conspiracy of which plaintiffs in error were convicted and sentenced, among the errors assigned for reversal was that the written statement of William Robert Taylor, taken on a preliminary examination, was admitted and read in evidence, over the objection of the accused. The statement was lengthy, and showed a cross-examination, or an opportunity for the cross-examination of Taylor by plaintiffs in error. It was quite sufficient, if accepted by the jury as true, to establish the guilt of some, if not all, of the accused.

The proposition presented to the court for determina-

tion, stated in the language of the learned justice who delivered the opinion was:

> "The present case *does* involve the construction and application of the Constitution of the United States. It is necessary to determine whether the admission of certain testimony was not an infringement of rights secured to the accused by the Sixth Amendment of the Constitution, declaring that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him."

After reviewing the facts with reference to the predicate laid for the admission of Taylor's deposition taken at the preliminary hearing, Mr. Justice Harlan said:

> "We are of the opinion that the admission in evidence of Taylor's statement or deposition, taken at the examining trial, was in violation of the constitutional right of the defendants to be confronted with the witnesses against them. It did not appear that *Taylor was absent from the trial by the suggestion, procurement, or act of the accused.* On the contrary, his absence was manifestly due to the negligence of the officers of the Government. Taylor was a witness for the prosecution ..... and on the very day when Taylor was called as a witness, within an hour of being called, he was in the corridor of the court-house. When called to testify he did not appear."

The court, after considering approvingly the decision in *Reynolds v. United States,* continued:

> "In his *Treatise on Constitutional Limitations,* Cooley, after observing that the testimony for the people in criminal cases can only, as a general rule, be given by witnesses in court, at the trial, says: 'If the witness was sworn before the examining magistrate, or before a coroner, and the accused had an opportunity

then to cross-examine him, or if there were a former trial on which he was sworn, it seems allowable to make use of his deposition, or of the minutes of his examination, if the witness has since deceased, or is insane, or sick and unable to testify, *or has been summoned but appears to have been kept away by the opposite party.*' (Cooley's Const. Lim., 2 ed., 318).

"In *Regina v. Scaife*, 2 Den. Cr. C., 281, 285, 286; s. c., 17; Q. B., 235; 5 Cox Cr. C., 243, which was an indictment against three persons for a felony, it appeared that the witness had been kept out of the way by the procurement of one of the accused, and the question was whether the prosecution could use the deposition of the absent witness taken before magistrates in the mode directed by 11 and 12 Vict., c. 42, s. 7. It was held by *all* the judges that the deposition was not admissible against a defendant who had not caused the absence of the witness. Lord Campbell, C. J., said: 'I am of opinion that the rule for a new trial must be made absolute. Evidence having been given that the defendant Smith had resorted to a contrivance to keep the witness out of the way, the deposition was admissible against him; but it was not admissible against the other defendants, there being no evidence to connect them with the contrivance. The learned Judge, Cresswell, J., in summing up to the jury, seems to have made no distinction as to the duty of the jury to consider the deposition of the absent witness as evidence against the defendant Smith alone, and not as against the others. The question then is, whether such a deposition is admissible against a prisoner without proof that the deponent has been kept away by his contrivance or without proof of the death of the witness. No case has yet gone so far; and I should be afraid to lay down a rule which would deprive a prisoner of the advantage of having a witness for the prosecution against him examined and cross-examined before a jury, upon every matter that may be material

to his defense. I, therefore, think that the deposition was improperly admitted against Scaife and Rooke, and that there should be a new trial.' Patterson, J.: 'The deposition of the absent witness, Sarah Ann Garnett, was admissible as against the defendant Smith, by whose contrivance she was kept out of the way, but it ought not to have been applied to the case against him only, and not to the case against the other prisoners. No such distinction appears to have been made at the trial, but the evidence was allowed to go to the jury generally against all the prisoners, it being assumed, without any evidence whatever to support the assumption, that they all were connected with the contrivance to keep the witness out of the way.' Coleridge, J.: 'Before the enactment of 11 and 12 Vict., c 42, I always understood the law was, that if a witness were absent, either by reason of the death of the witness, or by the procurement of the prisoner, the deposition was receivable in evidence against him. But I believe these were the only two cases where the absence of a witness let in his depositions. Absences from every other cause were within the same category, and did not render them admissible. The seventeenth section of the recent statute took another case—where a witness was proved to be so ill as to be unable to travel out of one category and put it into another.'

"In the present case there was not the slightest ground in the evidence to suppose that Taylor had absented himself from trial at the instance, by the procurement or with the assent of either of the accused. Nor *(if that were material)* did his disappearance occur so long prior to his being called as a witness as to justify the conclusion that he had gone out of the State and was permanently beyond the jurisdiction of the court. His absence, as already said, was plainly to be attributed to the negligence of the prosecution. The case *is not within any of the recognized exceptions to the general rule prescribed in the Constitution.*

"It is suggested that the action of the Circuit Court

was in harmony with the decisions of the Supreme Court of Alabama Lowe v. State, 86 Ala., 47; Pruitt v. State, 92 Ala., 41). We have examined the cases in that court to which attention has been called, and do not think they sustain the ruling of the court below under the circumstances disclosed by this record. *But the question cannot be made to depend upon the rules of criminal evidence prevailing in the courts of the State in which the crime was committed. It must be determined with reference to the rights of the accused as secured by the Constitution of the United States.* That instrument must control the action of the courts of the United States in all criminal prosecutions before them.

"*We are unwilling to hold it to be consistent with the constitutional requirements that an accused shall be confronted with the witnesses against him, to permit the deposition or statement of an absent witness (taken at an examining trial) to be read at the final trial when it does not appear that the witness was absent by the suggestion, connivance or procurement of the accused, but it does appear that his absence was due to the negligence of the prosecution. We need not decide more in the present case.*

"For the error referred to the judgment of the circuit must be reversed as to all the plaintiffs in error and a new trial awarded, except as to *Columbus W. Motes.*"

In the case of *United States v. Angell* (11 Fed. Rep., 34), the fact was conceded that the witness called on behalf of the accused was beyond the jurisdiction of the court and not amenable to its process. Judge Clark reviewed with care the question submitted, and concluded his opinion on this branch of the case in the following language:

"I have found no case where the testimony of a witness, absent but living, given at a former trial, has been

allowed to be proved at a subsequent trial. There are cases where the testimony of the witness in the preliminary examination has been allowed to be proved, when the witness had died, but none where he had *gone from the jurisdiction*. And I think the law must be held to be that when the witness is living he must be produced, or his testimony cannot be received in criminal cases, even if he be beyond the jurisdiction of the court or of all the United States. The Constitution of the United States provides (amendments, art. 6) that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him; and this without exception. Not if they can be produced, nor if they be within the jurisdiction, but absolutely and on all occasions. ..... Nor can it fairly be maintained that, if the witness has once been confronted with the accused, before the committing magistrate, that the requirements or guarantees of the Constitution are answered.

"It is little better than an evasion of the matter to say that if the witness has been present at the preliminary examination when the real question is whether the accused shall be held for the action of the grand jury, that, therefore, when he is indicted, and life, liberty or property are at stake, that right no longer exists. As well might it be said that if, in the complaint before the magistrate, the accused was informed of the nature and cause of the accusation; the subsequent indictment need not state that accusation again. The fair meaning of the Constitution is that wherever and whenever he is put on his final trial he shall be confronted with the witnesses against him, if they be alive. The ruling of the court in excluding the testimony of Belloir, upon a pretty thorough examination and mature consideration, is affirmed."

The substantial and fundamental right of the accused, safeguarded by the Constitution, is no less imperative than

the demands of public justice. Those rights are protected from invasion by the States, by the effective force of the prohibition contained in the Fourteenth Amendment.

The abuses and perversions of sound principles which creep into the law by yielding to the argument of *convenience*—to what is supposed to be necessary for the public good—cannot be better stated than it was in the course of the opinion of Mr. Justice Bradley in *Boyd v. United States*, 116 U. S., 616 and 635:

> "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to a gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen against any stealthy encroachment thereof. Their motto should be *obsta principiis.*"

Let the premise be considered (as it must be, under the settled jurisprudence of England and the Supreme Court of the United States) that in all criminal prosecutions the right of confrontation by the accused with the witness against him is a substantial and fundamental right protected by *Magna Charta* under the broad declaration that no man shall be deprived of life, liberty, or property without due process of law, and, at once, *subject to the recognized exceptions*, you have the prohibition contained in the Fourteenth Amendment, standing as a shield to the ac-

cused and as a barrier against the infraction of that right by the State through any of its agencies or by any of its departments.

It would be a meaningless act of supererogation to undertake an enumeration of the cases in which the proposition contended for on behalf of plaintiffs in error was supported by the solemn adjudications of the courts of England and America. In so far as relates to the English common law on tho subject, it will suffice to say that the exceptions recognized by Hale, Hawkins, Phillips, Chitty, Starkie, Roscoe, Archbold, Russell and Stephen are those declared in repeated and uniform constructions of the statutes of Philip and Mary and of George IV, by what Russell describes to be "the highest authorities, and upon general principles of evidence," and which came to be considered *"as a settled rule."*

So far as the American courts are concerned in but three of the States in which was adopted an *unqualified* constitutional provision giving to the accused in all criminal prosecutions the right to be confronted with the witnesses against him is there to be found decisions which hold that *the absence of a witness from the jurisdiction* will authorize the introduction of evidence previously taken upon the same issue. These are Alabama, Arkansas and Louisiana. In Louisiana the rule is that the absence from the State must be *permanent;* in Alabama and Arkansas it will suffice if the witness be *beyond the jurisdiction* of the court.

State v. Banks, 106 La. An. 480.
Jacobi v. State, 32 So. Rep. 158.
Vaughn v. State, 24 S. W. Rep. 885.

No effort was ever made in the State of Louisiana to enact any special statute warranting the receiving of depositions as substantive evidence in *criminal cases* otherwise than by the language written into Act 123 of 1898, which contains, in respect of testimony taken before the City Criminal Courts, among other things, the following:

> "When the testimony so taken is certified to by the stenographer and signed by the judge, it may be used as evidence in any subsequent judicial proceedings in case of the death or absence of the witness from the State."

Construing this statute the Supreme Court of Louisiana, after setting out its title, took occasion to hold:

> "The object of the act, as thus stated in its title, was to provide for the organization of the City Criminal Courts and for the regulation of procedure in the City Criminal Courts, *not* in the District Criminal Court. The act did not undertake to regulate procedure in the District Criminal Court, and cannot be held to have done so. If the clause in question, upon which the trial judge based his ruling, were construed to have the operation of regulating proceedings in the District Court, it would be construed to operate beyond the scope of the title of the act; that is, it would be construed into unconstitutionality. And it would be unconstitutional for the further reason that it would be establishing for the Parish of Orleans a different rule from that which obtains in the State *at large*. It would be in the nature of a *special* law regulating the *practice* of a court and changing *the rules of evidence*, in contravention of Article 48 of the Constitution. We think that by the clause in question nothing more was intended than to enumerate the rule of evidence that testimony taken at a preliminary ex-

amination becomes admissible on a subsequent trial in case of the death or permanent absence of the witness."

State v. Banks, 106 La. An. 480.

It is respectfully submitted that the portion of the statute quoted and commented upon was a mere *brutem fulmen,* stricken with absolute nullity. In an act, the avowed purpose of which is to provide for the organization of the City Criminal Courts and the regulation of procedure therein, it is no more competent for the Legislature to declare a *general* rule of evidence than it is to enact one *specially* applicable to the Criminal District Court. Every provision which did more than undertake to carry out the object of the statute as set out in its title, was to that extent unconstitutional. Even if the words employed be interpreted to mean that testimony may be used in case of the *death* or *permanent* absence from the State of the witness, they do not correctly embody the rule of evidence which obtains within this jurisdiction. Such depositions have never been considered "evidence in *any* subsequent judicial proceedings;" on the contrary, they are never admissible except when the subsequent proceeding involves the *same* issue between the *same* parties. Besides, the very enumeration of the cases in which such testimony is to be regarded as competent, under the rule of interpretation applied to statutory enactments, must be regarded as an exclusion of all others, and would render it inadmissible even where it was shown to the satisfaction of the trial court that the absent witness is *insane,* or *so sick that he*

*is likely never to be able to attend,* or that he is *kept away by the procurement or connivance of the accused.*

But be this as it may, it neither adds to nor, in any sense, alters existing conditions. The rule of evidence remains exactly as it was before the passage of the Act of 1898; and, since nothing has been "otherwise provided," under the direct and positive mandate of the Act of 1805, incorporated into the Revised Statutes as Section 976, this rule must be construed "according to the common law."

The Louisiana Constitution of 1812, in the enumeration of its Bill of Rights, in common with nearly all of the States of the Union, was modelled upon the Amendments to the Constitution of the United States adopted in 1791. All of these fundamental enunciations of principle found their inspiration in *similar* motives and were designed to secure the *same* protection to the citizen in his relations toward the National and the State governments, respectively.

It is illogical to assume that *when* the framers of the Constitution of 1812 studiously selected *the very expressions* employed by the makers of the Federal Constitution, they intended that in the two instruments identical words should import different meanings. That construction which holds good in respect of the original must, of necessity, apply to the copy.

Brown v. Walker, 161 U. S. 600.

The high tribunal which is charged with the delicate and all-important duty of interpreting the meaning of the lan-

guage incorporated into the Bill of Rights of the National and State Constitutions has performed its function with signal ability. It has declared that the purpose was "to embody certain guarantees and immunities which we had inherited from our English ancestors, and which had, from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions "which continue to be recognized as if they had been formally expressed." It maintained the doctrine that—"We are bound to interpret the Constitution in the light of the law *as it existed at the time it was adopted,* not as reaching out for *new* guarantees of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of *Magna Charta* —subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected."

Mattox v. United States, 156 U. S., 240.
Robertson v. Baldwin, 165 U. S., 281.

It has already been pointed out that in construing the statutes of Philip and Mary "upon general principles of evidence," the highest authorities in England determined primarily that, from the very circumstances of the case, *dying declarations* constituted an exception to the general rule which excludes hearsay evidence in *criminal trials.*

Upon this subject the Supreme Court of the United States held to the same reasoning that had controlled it in the other respects.

Kirby v. United States, *supra.* Cooley's Const. Lim., 387.

We desire to note that in the very last expression upon the subject pronounced by the Louisiana Supreme Court it was not only held that—"With us in Louisiana, *the rules of evidence* in criminal trials as well as the forms of indictment, method of trial, etc., must be according to the common law of England as it evisted in 1805, *unless otherwise provided,* (State v. McNeil, 33 La. An. 1333).

But it was added:

> "At that time (1805) the English statutes on the subject of depositions in criminal matters, taken before coroners and magistrates were 1 and 2 Philip and Mary, c. 13, §§ 4, 5, and 2 and 3 Philip and Mary, c. 10. (State v. McNeil, 33 La. An. 1334). These statutes of Philip and Mary *were received as common law in Louisiana.*"
>
> State v. Wheat, 35 So. Rep. 959.
> State v. Williams, 34 La. An. 1198-1200.
> State v. McNeil, 33 La. An., 1333.

It is assumed to have been demonstrated that, according to rules of evidence in force at common law, and which, by the Act of 1805, were adopted as the controlling principle in the trial of all criminal causes in Louisiana, the only circumstances under which the deposition previously taken of an absent witness could be admitted as substantive evidence against an accused are,—where the witness is *dead,* or *insane,* or *too ill ever to be expected to be able*

*to attend the trial,* or is *kept away by the connivance of the prisoner.* By the process of judicial inclusion and exclusion it becomes quite apparent that the absence of the witness from the State, even permanently, was never recognized among the exceptions. Not satisfied with this, however, it is now proposed to show, affirmatively, that at common law the strong and uniform current of authority is against the right to introduce the testimony of a witness who is *out of the jurisdiction* of the trial court and *beyond service of its process.*

> "But it hath been adjudged, that it is not sufficient to authorize the reading of such an examination, to make oath that the prosecutors *have used all their endeavors to find the witness but cannot find him.*"
>
> 1 Hawkins' P. C., c. 46, s. s. 6 & 7, p. 605.

Starkie declares, upon authority of Lord Morley's case, that "it was not sufficient to show that endeavors had been used to find the witness, and that he could not be found."

2 Starkie Ev., 283.

According to Roscoe: "It is not a sufficient ground for admission that the witness cannot be procured *on account of his absence in a foreign country.* R. v. Aus-

1 Roscoe Cr. Ev., 107.

Judge Taylor says: "In criminal proceedings a similar latitude is not allowable at common law, and the deposition of a witness, whether taken before a magistrate or coroner, will not be rendered admissible on mere proof that the witness himself *cannot be found after diligent search.* Neither will it be received though satisfactory proof be given that the witness was not absent from any intention to defeat justice, but that, *being a foreigner,* he *had,* since the prisoner was committed for trial, *returned to his own*

*country,* and was at the time of the trial *resident abroad..* This kind of evidence has also been *rejected in America,* both where the witness could not be found within the jurisdiction, but *was reported* to have gone to an adjoining State, and where *he was proved to have left the State,* after being summoned to attend at the trial.

1 Taylor Ev., § 474.

Mr. Justice Stephen declared that evidence given by a witness in a previous action *is not admissible in criminal cases* where the witness is *out of the jurisdiction of the Court,* nor when he *cannot be found.*

Stephen's Dig. Law of Ev., 76, 77.

Dr. Wharton also supports the proposition:

"Proof of mere disappearance of the original witness," he says, "it not of itself enough to admit such testimony if by due diligence the witness's attendance could have been secured; nor, in *criminal trials,* is such testimony made admissible by the fact that the witness, since the examination, *has left the jurisdiction, and is not amenable to process.*"

Whart. Cr. Ev., § 229.

In the opinion of Mr. Bishop, testimony given at a former trial or depositions taken before the examining magistrate is *not* rendered competent by the fact that an absent witness "cannot be found," or is "absent from the State or otherwise beyond the reach of process."

1 Bishop Cr. Proc., § 1195.

Mr. Underhill makes the announcement that:—"The mere fact that the witness is.....*out of the jurisdiction,* or that his *whereabouts are unknown* so that *he cannot be reached by subpoena,* is not enough" to admit the deposition of the absent witness.

Underhill Crim. Ev., § 262, p. 320.

Mr. Rapalje says in this connection: "The fact that a witness on such pevious trial, who is still living, is *absent from the State,* or *beyond the territorial jurisdiction of the Court,* is not generally ground for the admission of his previous testimony, *unless his absence is occasioned by the defendant.*"
Rapalje Crim. Proc., § 278.

In Abbott's *Trial Brief in Criminal Cases* it is said: "The fact that a witness who testified on a former trial of the accused on the same charge is..... *beyond the jurisdiction,* or *his residence or whereabouts is unknown,* is *not* ground for allowing his former testimony to be proved as evidence either for or against the accused." § 664.

This construction was sanctioned by the Supreme Court of the United States, in *Motes v. United States,* (178 U. S., 459); it constitutes the rule uniformly enforced in England even to the present day; and it is the doctrine approved and made effective in *four-fifths* of the States of the Union.

No one could possibly be unmindful of the patience and thoroughness displayed by his Honor, *Chief Justice Nicholls,* in considering the issue which was presented in this case. It is respectfully urged, nevertheless, that in the long list of decisions cited by counsel on behalf of the State and the almost equally formidable addition thereto furnished by the organ of the Court, (with the exception of three references to Dr. Bishop's works on *Criminal Procedure,*) every case relied upon was from the reported opinions of the Louisiana Supreme Court.

A study of the question will disclose that this imposing

array of precedents *is not supported by a single one of the authorities upon which it is presumed to have been founded,* and that the formal judgment of Mr. Bishop, as already indicated, is to the effect that depositions, *at common law* and under the old statutes, could not be read nor the previous testimony of the absent witness be introduced if simply he could not be found or if only he was absent from the State or otherwise beyond the reach of process.

Not only is this so, but, as has already been argued, in the Louisiana decisions it has been held, *in terms,* that the statutes of Philip and Mary were *received as common law in Louisiana.*

The fatal error which has been permitted to creep into the *Louisiana jurisprudence* is due entirely to the want of consideration given to the authorities cited in support of the rule of evidence propounded in *State v. Harvey* (28 La. An. 106), which is the leading Louisiana case upon the subject. An examination into the question will disclose the fact that this decision is *the foundation and precedent* for every adjudication relating to the rule governing the introduction in criminal cases, of depositions and of testimony delivered at a former trial that has been rendered in this State from that time to the last judicial utterance upon the matter in the 109th Annual Report.

At the date of the pronouncing of the opinion in *State v. Harvey* (February, 1876), the Constitution of 1868 was in operation under the bill of rights of which it was guaranteed to the accused that "he shall have the right of meet-

ing the witness face to face." *No special statute was in force* making any provision in the matter of the introduction of this class of depositions or of this character of testimony. On the contrary, it was expressly enacted, by a mandatory provision of the Revised Statutes (which has been the law of the State from 1805 to the present time), that:—

> "All crimes, offenses and misdemeanors shall be taken, intended and construed according to and *in conformity with the comon law of England;* and the forms of indictment (divested, however, of unnecessary prolixity), *the method of trials, the rules of evidence,* and all other proceedings whatsoever in the prosecution of crimes, offenses and misdemeanors, changing what ought to be changed, *shall be according to the comon law,* unless otherwise provided."
>
> Rev. Stat. § 976;
> Acts of 1855, p. 151;
> Acts of 1805, p. 440.

The point at issue on the appeal prosecuted by Harvey was *that* presented in the bill of exceptions reserved because of the admission in evidence of the deposition of one George Morris, taken before the committing magistrate and offered in evidence by the State. The ground of objection was "that the Constitution of the United States, as well as that of Louisiana, gives to every accused person on trial the right of being confronted, *face to face,* by the witnesses against him, and that such proceeding in effect deprives him of such right."

The reasoning of the Court is set out in the opinion in these words:

"Before admitting the deposition it was proved that the witness *was absent and could not be found;* that on the preliminary examination he testified in presence of the accused; that his testimony was reduced to writing, read to and subscribed by him in presence of the accused, and attested by the committing magistrate.

"This seems to bring the case *within the common law rule* to the effect 'that if due diligence has been used, and it is made manifest the witness has been sought for and cannot be found, or if it be proved that he was subpœnaed and fell sick by the way, his deposition may be read, for that, in such case, he is in the same circumstances as to the party that is to use him as if he were dead.' See Archbold's Criminal Practice and Pleading, seventh edition, vol. 1, p. 479, note (1); B. N. P., 239; Hawk. P. C., b. 2, c. 46, s. 18.

"If the accused had the witness 'face to face' on the preliminary trial and had the opportunity to cross-examine him, his constitutional right, invoked by him, is not violated by the introduction on the final trial, of the deposition of such witness, where it is shown that the witness cannot be procured. Otherwise it would be in the power of the accused to deprive the State of the testimony of all witnesses against him by preventing their attendance through some undue influence, or the State would be deprived of the proof by the death of the witness; for the constitutional right would apply equally in both cases, and thus convictions might never be obtained."

Put to the test of analysis the opinion will be found to hold:

"1. That, as shown by a statement in a *note* to *Archbold's Practice and Pleadings,* (which is said to be supported by the authority of *Buller's Nisi Prius* and *Hawkin's Pleas of the Crown*), the common law rule is to the

effect "that if due diligence has been used, and it is made manifest that the witness has been *sought for and cannot be found*.....his deposition may be read, for that, in such case, he is in the same circumstance as to the party that is to use him *as if he were dead.*" And that, as the facts in the case presented for review bring it within this rule, the testimony of the absent witness who could not be found was admissible unless in conflict with the constitutional right of the defendant to meet him "face to face."

2. That if the accused had the witness "face to face" on the preliminary examination and had the opportunity to cross-examine him, the constitutional right invoked by him was not violated by the introduction on the final trial of the deposition of an absent witness who could not be found.

3. That otherwise the State by death or through the corrupt practices of the accused would be deprived of the testimony against him since the constitutional right would apply equally in both cases, and thus convictions might never be obtained."

To this last suggestion a complete answer is found in the fact that, at common law, prior to the adoption of the Constitution of the United States and the Constitution of Louisiana, the deposition would have been admissible if the witness were *dead* or if his absence *was brought about by the means or contrivance of the accused,* and that these two cases were among the *five* recognized exceptions to the right of a prisoner to be confronted with the witnesses against him that were well established before the adop-

tion of these Constitutions, and were not intended to be abrogated by them.

The first of the reasons advanced has already been shown to be without foundation. According to the uniform current of authority, under the rule of the common law, the deposition of a witness who was *sought for with due diligence and could not be found* or who was absent *beyond the jurisdiction of the trial court,* has *never* been admissible in evidence in *criminal cases.*

2 Starkie Ev., 283.
1 Roscoe Cr. Ev., 107.
1 Taylor Ev., § 474.
Stephen's Dig. Law of Ev., 76, 77.
Wharton Cr. Ev., § 229.
1 Bishop Cr. Proc., § 1195.
Underhill Cr. Ev., § 262.
Rapalje Cr. Proc., § 278.
Abbott's Cr. Tr. Brief, § 664.

And, as a matter of law, the very cases cited by Mr. Justice Howell in support of his position will make it clear that he was misled by placing reliance upon the *note* to Archbold and omitted to consult the *text* of that author and of *Buller* and *Hawkins.*

The exceptions enumerated by Mr. Archbold are: "If the witness were then *dead,* or bed-ridden, and *not likely to be ever able to attend at the assizes,* or *unable to travel,* or had become *insane,* or was *kept out of the way by or on behalf of the prisoner.*"

1 Archb. P. & P. (Wat. Notes) 480, *and B. N. P.,* 239.
*Hawkins P. C.,* b. 2, c. 46, s. 18.

In so far as concerns the declaration of *Mr. Justice Buller*, it will be discovered upon turning to his work on *Nisi Prius* that the passage which is accepted by Mr. Justice Howell as laying down the common law rule in *criminal cases*, as stated by this eminent English Judge, at page 239, *is* to be the rule in *civil actions*. In construing the statutes of Philip and Mary, which controlled in *criminal prosecutions*, Sir Francis Buller (clearly against the almost unanimous weight of English authority) limits the exception exclusively to the case of *the death of the witness*.

Buller's Nisi Prius, 242.

The citation from Hawkins is given as *b. 2, c. 46, s. 18*. This section treats solely of the right of accomplices to be witnesses against the accused. The limitations placed upon the common law rule requiring testimony, in criminal cases, to be taken in open court and in the presence of the accused are enumerated in sections 6 and 7 of this chapter. There, after reciting that the depositions under the statutes of Philip and Mary were receivable in evidence where the deponent "is *dead*, or *unable to travel*, or *kept away by the means or procurement of the prisoner*," Mr. Serjeant Hawkins adds: "But it hath been adjudged, that it is not sufficient to authorize the reading of such an examination, to make oath that the prosecutors *have used all their endeavors to find the witness, but cannot find him.*"

1 Hawk. P. C., c. 46, s. s. 6 & 7.

In but one of the cases, subsequent to *State v. Harvey*, has any effort been made to support, by citation of authorities, the Louisiana rule which is *the mere creation of judi-*

*cial legislation*, nor, does it appear that the later attempt was in any respect entitled *to more serious consideration* than the *first.*

Said *Mr. Justice Fenner*, in *State v. Jordan:*

> "The bill of exceptions to the Judge's ruling in admitting the testimony of a witness taken on a preliminary examination cannot be sustained under the circumstances disclosed herein. The witness was a non-resident of the State, who only chanced to be here at the date of the preliminary examination, and had never since been in the State. The accused had been confronted with him at the examination and had the opportunity of cross-examining him. No amount of diligence on the part of the prosecution could have secured his attendance at the trial. The case falls fully under *the doctrine of necessity*, under which such evidence is held to be admissible. 1 Bishop Cr. Proc., Sec. 1195; Wharton Cr. Ev., Sec. 229."
>
> 34 An. 1219.

As a matter of fact this very question had been discussed in the English Court of Criminal Appeal, as far back as January, 1856, before Pollock, *C. B.*, Alderson, *B.*, Coleridge, and Willes, *J. J.*, and a conclusion *unanimously* reached which is in direct conflict with that announced by Mr. Justice Fenner. The syllabus, as given in 7 Cox's C. C., p. 55, is as follows:

> *"Evidence—Admissibility of deposition—Foreign witness absent abroad. Upon a trial for felony it is no ground for receiving in evidence a deposition taken before the committing magistrate that the witness is a foreigner and absent in a foreign country."*
>
> (See Appendix, p. 22, *Reg. v. Austen.*)

Roscoe declares the rule to be— "It is not a sufficient ground of admission that the witness cannot be produced *on account of his absence in a foreign country.*" (Roscoe Cr. Ev., 107).

Taylor announces the doctrine in these terms: "Neither will it be received though satisfactory proof be given that the witness was not absent from any intention to defeat justice, but that, *being a foreigner,* he had, since the prisoner was committed for trial, returned to his own country, and was at the time of the *trial resident abroad.*" (1 Taylor Ev., § 474).

To the effect that it is not sufficient ground that the witness *has left the jurisdiction* and is *not amenable to process,* see also:

Stephen's Dig. Law of Ev., 76, 77.
Underhill Cr. Ev., § 262.
Rapalje Cr. Proc., § 278.
Abbott's Cr. Tr. Brief, § 664.
1 Bishop Cr. Proc., § 1195.
Wharton Cr. Ev., § 229.

It is a singular coincidence that Mr. Justice Fenner should have been as unfortunate in his citation of authorities as had been the organ of the court in *State v. Harvey.* He quotes *1 Bishop Cr. Proc.,* sec. 1195; *Wharton Cr. Ev.,* sec. 229.

True, Dr. Bishop notices that there are exceptions "growing out of necessity;" but his enumeration is limited to the instances where the witness has died, or is insane, or where he was kept out of the way by means or pro-

curement of the defendant or is so ill as to be unable to travel. In the very same section he adds—"but not if simply he cannot be found or if only *he is absent from the State or otherwise beyond the reach of process.*"

Section 229 of *Wharton's Criminal Evidence* does not undertake to give any reason for the exceptions recognized to the rule excluding hearsay. It does, however, declare that in criminal cases the testimony of an absent witness is *not* made admissible "by the fact that the witness since the examination, *has left the jurisdiction* and is not amenable to process."

Of course, if in Louisiana the method of trial, the rules of evidence and all other proceedings in the prosecution of crimes must be according to the common law of England as it existed in 1805, unless otherwise provided (*State v. McNeil,* 33 An. 1322; *State v. Stewart,* 34 An. 1040; *State v. Wheat,* 35 So. Rep., 959), and at common law these depositions were *not* admissible, it is not essential to determine whether or not the taking of such testimony was violative of the constitutional right, under the organic law of the State, of the accused to be confronted with the witnesses against him. There would in that case be absolutely *no warrant* whatever *in law* for such a procedure. Therefore, under the present condition of Louisiana legislation, *with no statute in force* which relates to the rules of evidence in criminal cases, except Section 976 of the Revised Statutes, such a question would prove purely speculative. Still it would be the part of in-

sincerity, by remaining silent, to seem to lend acquiescence to the conclusion reached by Mr. Justice Howell that the constitutional provision would be satisfied if at a preliminary examination the defendant was confronted with the witnesses against him, and afforded the opportunity to cross-examine them.

The constitutional right to confront the witnesses imports that the only exceptions that can ever be recognized, *so long as this safeguard is maintained, without qualification, in the organic law,* are those which existed, at common law, at the time of the adoption of the Constitution of 1812. The doctrine upon which these exceptions are established is that "the *exceptions* were as well understood as the *rule* out of which they came; and that, as a consequence of this knowledge, in adopting the rule, the framers of our bill of rights must be understood *as adopting the exception.*"

It follows, therefore, that the only exceptions which are understood to have been established *as though written into the Constitution* are those which existed at the time the bill of rights was first adopted. From the very nature and object of the instrument it follows as a clear result that no modification, upon any pretense, can be made in it by the judiciary, by the executive, or by the legislature. No exception *not intended by the language used* can be declared *otherwise than by the Constitution itself.*

When our Constitution took up the principle of *presence,* at a criminal trial, of the witnesses against the accused, that principle, with the exceptions which went with it, be-

came fixed and unbending, and as a consequence the exceptions were elevated beyond the reach of legislative or judicial action. If this be conceded—and in the light of the *four* solemn adjudications of the Supreme Court of the United States already cited, who will be bold enough to gainsay it?—then it follows inevitably that only the exceptions which were declared by the English courts, before the adoption of our Constitution, have been established, and that in every other instance it would be a flagrant disregard of the guarantee of the fundamental law to deny to the accused *the right* to be confronted with the witnesses against him in every stage of a criminal prosecution.

Through its venerated *Chief Justice,* the Louisiana Court, when disposing, in the same case, of the issue raised as to the admissibility of the deposition of the two absent and non-resident witnesses, after having cited numerous instances in point reported in the *Louisiana Annuals,* said:

> "A reference to these various decisions will show that this court has repeatedly permitted the introduction in evidence of testimony of witnesses which had been taken down in writing on a preliminary examination, when the presence of the witnesses themselves at the trial could not be obtained. In the case before us the witnesses whose written testimony was so received were permanently absent from the State. The accused were present at the examination, and cross-examined the witnesses. The jurisprudence of the State on the subject fully warranted the action of the district court in permitting the testimony to be introduced."
>
> 109 La. An. 622.

All that is here declared by the learned *Chief Justice* is absolutely indisputable, but it is nevertheless urged, with all due deference to the better judgment of this tribunal, that such jurisprudence is founded in error and is in direct and flagrant violation of both the Constitution and the mandatory statute requiring that, in the prosecution of crimes, the method of trial, the rules of evidence and all proceedings whatsoever shall be in accordance with the English common law as it stood in 1805. State v. McNeil, 33 La. An. 1333; State v. Williams, 34 La. An. 1198-1200; 35 So. Rep. 959.

The number of times that a legislative enactment has been disregarded can detract not one iota from the obligation of the courts to respect and enforce it, and no amount of repetition can give the weight of authority to an adjudication which is in conflict with the citations upon which it is predicated.

We will assuredly be permitted here to interpose the sentiment so happily expressed by Lord Kenyon in *King v. Eriswell.* Speaking of Mr. Chief Justice Foster's indignation at an appeal to the law of usage, his lordship felicitously remarked: "I perfectly well recollect that learned judge saying, *communis error facit jus,* but he hoped that he should never have that rule insisted upon to set up a misconception of the law, in destruction of the law. The mistakes of judges, provided they become universal, would, according to that doctrine, become rules of law. An usage, commencing at soonest since, 13 and 14 Car., 2,

contrary to law, and working injustice every day it was persisted in would supersede the law.....I regard the question as of the last importance, and as putting in danger the law of evidence, in which every man in the kingdom is deeply concerned."

"Why," asked one of the most eminent and logical advocates that has ever been heard at the American bar, "are the facts contained in the deposition of a dead or absent witness not entitled to 'full faith' at the hands of the jury who are to consider them?"

To this question he makes answer:

> "It is not because they are not facts sworn to by a witness who has personal knowledge. This is not the reason. If faith in the facts communicated be shaken, it is because of the *absence* of the witness—because the only test of their truth or falsehood provided by the Constitution is taken from the jury. The *presence* of the witness is wanting, and that is all that is wanting; what is wanting is the very thing the Constitution says shall not be wanting.....But how are the jury to determine the extent of their 'faith' in the 'facts thus communicated?' How are they to determine what would have been the measure of their faith in the witness if they had seen and heard him swear, so as to deduct the loss against the deposition? It is too manifest for further elaboration that on principle the thing cannot be done; and in practice, the deposition is taken for truth, unless it be contradicted by itself or by independent evidence."

Let us suppose, for example, that since the taking of the deposition, but before the trial, the absent witness made statements contradictory to his testimony at the prelimin-

ary examination. How, under such circumstances, in view of the unbending rule requiring that a proper foundation be laid before evidence can be heard to impeach him, would it be possible to ask him, on cross-examination, whether he had not made such contradictory statements?

The only possible principle upon which *exceptions* are regarded as having any existence in respect of the constitutional provision that in all criminal prosecutions the accused shall have the right to be confronted with the witnesses against him is that it embodies a guarantee which, adopting the language of Mr. Justice Brown, "we inherited from our English ancestors and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case;" and this because, as he adds, "in incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continue to be recognized *as if they had been formally expressed.*". It is not because such exceptions are "wise," "expedient," or "just" or "necessary" that they are considered as established, but solely for the reason that the protection afforded by this particular clause of the bill of rights was understood at the time of its enactment to have been adopted, subject to these exceptions, which continue in force exactly as though they had been formally written into the constitutional article.

As has been justly said of a Constitution under our system of government:

"A power in either department of the government to declare exceptions to its provisions not therein made, is incompatible with the idea of *prohibition* in the instrument. It is no longer a prohibition on that department which can make the exception. The power to create exceptions is a power above the Constitution; and the power to declare exceptions not declared in the instrument is a power to create exceptions."

It is not because an exception arises out of the necessities of the case that it can be recognized. To contend for such a construction would be to strike with nullity the constitutional guarantee. If no exceptions had existed *at the time* of the adoption of the guarantee, to which it was in tended to be subject, the courts would be under moral obligation to *literally* enforce its provisions in accordance with the language employed. The basis for the exception is not the actual necessity—nor the assumed necessity under judicial construction—but the fact that the true meaning of this clause of the bill of rights is that it shall be understood as guaranteeing the right to the presence of the witnesses in open court in every case where that right existed under the common law at the time when the Constitution went into operation. In other words, in the intendment of the farmers of the instrument, its provision is to be read as though it declared in terms: "The accused, in every instance, shall have the right to be confronted with the witnesses against him, except in cases of dying declarations in reference to the same homicide, and in cases where the deposition or testimony of a witness has been regularly taken or.

heard in a judicial proceeding against the accused in the same transaction, when the production of the witness in court is rendered impossible because at the time of the trial he is dead, or insane, or so ill that it is not likely that he will ever be able to attend, or is absent by reason of the procurement or connivance of the accused."

It may be pertinently observed that during the 350 years that have elapsed since the passage of the statutes of Philip and Mary, the English judges have never undertaken to declare that the absence of a witness beyond the jurisdiction and process of a court shall be taken to create such a necessity as will justify the admission of his deposition. Instead of this, they have expressly held that upon a trial for felony it is no ground for receiving in evidence a deposition taken before the committing magistrate that the witness is a foreigner and absent in a foreign country.

If then, unhampered by even a statutory provision, similar to the fundamental guarantee in Louisiana, these eminent judges during three centuries and a half have steadily refused to consider such absence as constituting a controlling necessity for the introduction of secondary proof, upon what line of reasoning can a different course be justified here, in the very face of the safeguard contained in the Louisiana bill of rights, as protected by the provisions and prohibitions of the Fourteenth Amendment to the Federal Constitution?

To assume that the power so to adjudge is vested in *the State courts* is to turn the protection intended by the bill

of rights into an empty mockery. If they can constitutionally declare other exceptions than those which existed at the time of the adoption of the Constitution, then that instrument is not fundamental law, and is not binding upon the organisms it creates, but, on the contrary, the judicial department is a power above the Constitution. To concede the authority of the courts to modify it in *any* respect is to recognize their authority to change it in *every* particular If they can judicially declare what exceptions spring from *necessity*, they may equally declare those which now, or may hereafter, arise, coming within the mischiefs of *inconvenience*. If they may decide that the deposition of a witness who is permanently absent from the State or whose whereabouts are unknown, is competent evidence against an accused, what constitutonal prohibition is there to which appeal can be made to prevent extending the exception to the case of a witness temporarily beyond the jurisdiction of the court, or fifty or even ten miles away from the place of trial?

We are not unmindful of the fact that the United States Supreme Court has declared that its "flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law," and that while "the Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history, it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations, and of many tongues."

"*That while the cardinal principles of justice are immutable,* the *methods* by which justice is administered, are subject to constant fluctuation, and the Constitution of the United States, which is necessarily, and to a large extent, inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the States of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land."

But we remember also, that it was solemnly adjudged that the power of the States, is not unlimited; that "while the people of each State may doubtless adopt such systems of laws as best conform to their own traditions and customs, the people of the entire country have laid down in the Constitution of the United States certain fundamental principles to which each member of the Union is bound to accede as a condition of its admission as a State."

The necessities of this case in no sense require any discussion of the limitations of doctrine within which the power of the State to infringe upon the fundamental *rights* of the citizen is to be confined.

Our own contention is simply that when the bill of rights was incorporated into the Federal and State constitutions, in the language of Mr. Justice Brown in *Robertson v. Baldwin,* 165 U. S., 281, it was intended "to embody certain guarantees and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions

arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continue to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation. The right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy (article 5) does not prevent a second trial if upon the first trial the jury failed to agree, or if the verdict was set aside upon defendant's motion (U. S. v. Ball, 163 U. S., 672); nor does the provision of the same article, that no one shall be a witness against himself impair his obligation to testify, if a prosecution against him be barred by the lapse of time, a pardon, or by statutory enactment (Brown v. Walker, 161 U. S., 591, and cases cited). Nor does the provision that an accused person shall be confronted with the witnesses against him prevent the admission of *dying declarations* or the depositions of witnesses who have *died* since the former trial. (See also U. S. v. Cruikshank, 92 U. S., 542.)"

Accepting the doctrine here laid down in its entirety, we assert that *in the absence of any legislation upon the subject*, the only limitations upon the fundamental rule excluding hearsay and secondary evidence in the trial of *criminal causes*, are those well-recognized *exceptions*, aris-

ing from the necessities of the case, declared under the ancient common law, the statutes of Philip and Mary and of George IV and by *this court*. In the case of depositions, or where it is sought to introduce evidence given at a former trial, these are: 1, Where the witness is dead; or 2, so sick as to make it likely he will never be able to attend the assizes; or, 3, is insane; or, 4, where his absence is brought about through the procurement or connivance of the accused. And this we submit is the doctrine enunciated by the English courts, by the English writers on the law of evidence, by the United States Supreme Court in its construction of the Federal Constitution, and by every American writer of authority, who has given his views upon the subject.

We feel authorized, under the showing already made, to assert that the provisions in the Federal and the State constitutions guaranteeing to the citizen, in all criminal prosecutions, the right to be confronted with the witnesses against him, does no more than to embody in these instruments a right inherited from our English ancestors which is subject to no other limitation than that comprised in the well-recognized exceptions arising out of the necessities of the case which are incorporated into the common law.

Neither in this court nor in the courts of England has sanction ever been given to the legal heresy that whenever the accused has had opportunity for cross-examination, either as to a deposition taken before a committing magistrate or testimony delivered at a former trial, the same was admissible evidence in a *criminal trial*, merely because the absent witness was beyond the jurisdiction of the court

or because it was satisfactorily established that after due diligence used he could not be found.

The English courts and text-writers, with practical unanimity, have declared that under the ancient common law no testimony was to be heard in prosecutions for crime, except *viva voce*, and in the presence of the accused, but that, after the passage of the statutes of Philip and Mary, this strictness was no longer pursued in practice and, notwithstanding the rule holding hearsay evidence to be incompetent, (the proper predicate being laid,) it was almost universally adjudged, that depositions taken before a magistrate and testimony delivered at a former trial, are valid proof whenever the absent witness is dead, or insane, or so sick that it is unlikely he will ever be able to attend the assizes, or is kept away by the procurement of the prisoner.

This view, as we *reiterate*, is not only supported by this court and the court of King's Bench, but is recognized by every English and American writer of authority upon the law of evidence.

Except, therefore, in exactly three States—Alabama, Arkansas and Louisiana—we have been unable, after diligent and patient research, to find any decision in the State courts justifying the doctrine announced and the practice contended for above, *except* when authorized by constitutional provisions or statutory enactments passed pursuant thereto.

### In Nevada.

In Nevada, the rule as to the introduction in evidence in criminal prosecutions, of depositions and testimony of wit-

nesses in former trials against a prisoner, is controlled *by statute* (State v. Jones, 7 Nev., 408).

### In Colorado.

In Colorado, the constitutional provision that in criminal prosecutions, "the accused shall have the right.....to meet the witnesses against him face to face," is immediately followed by another provision permitting the taking of depositions to be used upon the trial, where the witness is in prison for the purpose of securing his testimony.

"These provisions," says the supreme court, "being a part of the same instrument, must be construed *in pari materia;* and, when so construed, no doubt can be entertained that in this State, at least, there is constitutional sanction for the taking of a deposition on the part of the prosecution, and the introduction of the same against the accused upon final trial *under some circumstances.*"

But even under these conditions, it was adjudged that the act passed to give effect to this last constitutional provision, being an exception to the general rule requiring the prosecution to confront the accused on the final trial with the witnesses against him, "must be followed in all substantial particulars, or the deposition will not be permitted to be read to the jury."

Ryan v. People (supreme court of Colorado, June 17, 1895), 40 Pac. Rep., 775.

### In Texas.

We have already taken occasion *supra,* to note that the opinion in Sullivan's case (6 Court of Appeals, Texas), though justified under the Code of Criminal Procedure,

could not be supported under the rules of the common law, and was not in accord with the common-law authorities cited.

In Allen v. State, 16 Tex. App., 237, the only point at issue and decided, was that under the Code of Criminal Procedure, art. 23, "the defendant to a criminal prosecution for any offense, may waive any rights secured to him by law, except the right to trial by jury in a felony case." Menges v. State, Texas Appeals, reported in 2 S. W. Rep., 812, is a decision upon the construction to be placed upon articles 772 and 773 of the Code of Criminal Procedure, which make depositions and testimony delivered at a former trial admissible where the absent witness resided out of the State or had removed beyond the limits of the State, or was dead, or had been prevented from attending court through the act or agency of the defendant. It was distinctly determined here that the necessary predicate was not established.

It is, therefore, manifest that *the decisions in this State are all controlled by the statutory provisions.*

### In Indiana.

The constitution of Indiana declares that one accused of crime shall "have the right ..... to meet the witnesses face to face."

By section 1805 of the Revised Statutes, it is provided:

"The defendant may, by leave of the court, take the depositions of witnesses residing out of the State, to be read on the trial; but, before leave is given, the defendant must enter of record his *consent* that the depositions of

witnesses residing out of the State may be taken and read on behalf of the State, relative to the same matter, and the defendant may, on the same terms, and by leave of court, or by notice to the prosecuting attorney, take the depositions of any witness *conditionally.*"

It was held that this statute confers upon an accused person a right he did not have at common law, namely, the right to take depositions in a foreign jurisdiction, and confers it *upon condition* that he would concede *a like privilege* to the State.

"No right is taken from him,' said the court; "but an additional one is granted him. It seems clear to our minds that a statute conferring a new and beneficial privilege upon the defendant cannot be deemed unconstitutional because it annexes to the grant a condition favorable to the State, but just in itself and not oppressive to the accused. The right stands as it is given by the statute, and that is a right to exercise the privilege conferred upon the condition that a like privilege be conceded to the State. No restraint is imposed upon the acused; it is left to his free, unfettered choice; he may accept the offered privilege, or he may not, just as he wills, but if he does accept it, he must take it as the statute gives it. The right conferred by the statute is a single, indivisible one; the condition is an integral part of it, and if the accused accepts the benefits of the statute, he must take it just as it is given; he cannot take it in part and reject it in part. In his acceptance of the new right, he takes solely by virtue of the statute, and necessarily takes the burden with the benefit. He cannot create a right, he can only take what the law has created. We are of opinion

that the statute does not contravene the provisions of the State constitution."

This well-considered opinion concludes with the statement:

> "If, however, the accused did have the constitutional right to confront the witnesses, still there is no cause for reversal, because that right *was waived.* Our decisions have steadily maintained the power of a defendant to *waive* a constitutional privilege intended for his benefit."
> 97 Ind., 378.

Is it not clear, from what is here adjudicated, that the instances controlled by section 1805 of the Revised Statutes of Indiana are the only extensions of the common-law rule which are recognized in that State?

IN PENNSYLVANIA.

In Lightner and others against Wike, 4 Sarg. & Rawle, it was held by Tilghman, C. J., in a *civil case,* that:

> "It is a rule of law that what *a deceased witness* swore to at a former trial, may be given in evidence at a subsequent trial of a cause depending between the same parties."

In another *civil action,* Emig v. Diehl (1873), Mr. Justice Sharswood, in delivering the opinion of the court, said:

> "Though we have no express decision upon the subject, it seems clear upon principle that the deposition or testimony of a witness formerly taken in the cause, can be read in evidence on showing that he is sick and unable to attend, insane or in such a state of senility as to have lost his memory of the past, equally as where he is dead or out of the jurisdiction."

In *Brown v. Commonwealth,* 73 Pa. St., decided in the

same year, the court held, that in a *criminal prosecution* the testimony or deposition of a witness taken in due form is admissible in evidence at the final trial, *if the witness be dead.* The doctrine of Commonwealth v. Richards, 18 Pick., 434, was approved, and the opinion of the court made to rest on 1 Pitt Taylor on Ev., 445 and 447, and on Dr. Wharton's valuable *Treatise on Criminal Law,* vol. 1, 667.

Since then, by the act of May 23, 1887, it is provided that wherever a person has been examined as a witness in any proceeding conducted before a court of record in the presence of the accused, who had an opportunity to examine or cross-examine, if the witness afterwards die, or be out of the jurisdiction, or cannot be found, or become incompetent to testify for any legally sufficient reason, properly proved, notes of his examination shall be competent evidence upon a subsequent trial of the same criminal issue. (See Commonwealth v. Cleary (1892), reported in 23 Atlantic Rep., 1110).

### In New York.

At this day, in New York, in criminal prosecutions, the right to introduce depositions properly taken before the magistrate or coroner, or the testimony of absent witnesses, taken at a former trial is regulated *by statute.*

*The People v. Restell,* 3 Hill, 289, was determined before the adoption of the present statute. In this case, Mr. Justice Bronson, as the organ of the court, declared that the enactment then in force, was similar in its provisions to 1 and 2, and 2 and 3 Phil. and Mary, excepting that it

authorized the taking of these depositions in cases of *misdemeanor*, as well as *felony*, and then adjudged that the only exceptions recognized at common law to the rule in criminal cases that a witness must appear in court and be confronted by the accused party, were: dying declarations in prosecutions for homicide, and [provided the statute has been followed,] where the witness cannot be produced at the trial *because he is dead*, and in some other cases. While the other cases are not enumerated, the learned judge in the context, at page 296, makes it clear that under the laws of New York, as then in force, the exceptions to the excluding hearsay testimony, were those that obtained in England under the statute of Philip and Mary.

In *Wilbur v. Seldon*, 6 Cowen, 162, it was held: That even in a *civil cause* what a witness swore on the former trial, could not be given in evidence, *unless he is dead;* that he is beyond the reach of process of subpoena, and cannot be found upon diligent inquiry, *will not* render such proof admissible.

In *Bebee v. People*, 5 Hill (N. Y.), 33, the court, through NELSON, C. J., held:

> "But for the *consent* of the prisoner's counsel, Dutton's deposition could not have been received in evidence inasmuch as no proper foundation for admitting it was laid by proving the witness' death, insanity, inability from sickness to attend the trial, or collusion with the prisoner (Rosc. Crim. Ev., 50, 51; The People v. Restell, 3 Hill, 289). Such consent having however been *deliberately* given, I think the court below were right in refusing to allow its withdrawal.'

And in *Crary v. Sprague,* 12 Wendell (N. Y.), 43, the same court, declared:

> "NELSON, J.: If the testimony of John L. Shearer on the former trial had been used by the plaintiff, and the objection to its competency on the score of the interest of the witness had been made by the defendants, now for the first time, there would be some plausibility, if not force, in the argument, that had it been made before, the witness might have been released; now it is too late. Even under this view of the question, I will say it would be decisive; for the evidence of the former testimony is admitted only from necessity, and is justly liable to many exceptions; and it seems even still to be questioned by high authority if it be admissible *at all* in a *criminal case* (2 Hawk., 606, 12; Peake's Ev., 60), though *I think it would.* Eminent judges have cast a doubt over the soundness of the rule, and Lord Kenyon confined its operation to an almost impracticable strictness, evidently from the danger of its great facility to abuse (1 Phil. Ev., 199, 200, Gould's ed.; 2 Johns. Rep., 21, per Livingstone, J.; 14 Mass. R., 234; 6 Cowen, 162). It will not be allowed, unless the witness *be dead* and his death affirmatively shown. Even diligent inquiry, without being able to find the witness, is not sufficient, though it is obvious there can scarcely be a shade of difference between the two cases (death and absence), either in principle or hardship. I mention these circumstances to show the great strictness with which the rule is guarded by the court."

At the time of the decision in the case of *The People v. Williams,* 35 Hun., 516, by the terms of the Code of Criminal Procedure, "where the testimony is taken contradictorily with the accused before a magistrate, and the testimony reduced to the form of a deposition, or where the testimony of the witness on the part of the people, unable

to give security for his appearance, has been taken conditionally, according to sections 219 and 220, the deposition of a witness may be read upon its being satisfactorily shown to the court that he is dead or insane, or that he cannot, with due diligence, be found within the State."

In New York there is no constitutional provision guaranteeing to the accused the privilege of being confronted with the witnesses against him. Such a declaration of right is however contained in the Revised Statutes.

Whether the codal provisions are in violation of the fundamental rights of the accused, as secured by *Magna Charta*, it is unnecessary for the purpose of this argument to inquire. It is a question, under the doctrine announced by this court in Hopt v. Utah, 110 U. S., 574, and in Brand v. U. S., 168 U. S., 543, *for future resolution.*

We feel authorized, however, to announce, without danger of contradiction, that the change from the common-law rule in the doctrine with respect to the exceptions which obtain in the State of New York, relative to the introduction of depositions, is based, not upon the fundamental right of confrontation, but upon the right of confrontation as qualified and restricted by the codal provision.

See also People v. Penhollow, 42 Hun., 103.

The case of *The People v. Fish,* reported in the 125 N. Y., 151, next invites our consideration, and while it is based upon the codal provisions with respect to witnesses absent from the court's jurisdiction, there were presented the rights of the accused to confrontation, protected by vir-

tue of the Fourteenth Amendment of the Federal Constitution. It was there suggested that a denial of the right, or its qualification, or its limitation beyond the common-law exceptions, was "a denial of the privileges and immunities" of the American citizen, protected against infraction by the States.

Whether the reception of the evidence objected to amounted to the denial of the fundamental right of confrontation of the accused with the witnesses against him, and therefore the conviction resulting, was not in accordance with "the law of the land," was neither suggested at the bar, nor considered by the court. The argument addressed to the court in the discussion of this question was limited to whether the right of confrontation was one of the constitutional privileges or immunities, and not directed to any inquiry whether it affected a substantial and fundamental right which cannot be surrendered, and which the States cannot impair. Even when dealing with the right asserted by the accused of confrontation as one of the "privileges and immunities" of American citizens, the court had some hesitation, as evidenced by its opinion in reaching a conclusion adverse to the accused, for after having passed upon the issue, it qualified its *dictum* in the following language:

> "But, *even if we are wrong* in this construction of the Fourteenth Amendment, we think it clearly settled by numerous adjudications, that the right of the defendant to be confronted with the witness within the meaning of the Federal Constitution, the bill of rights, was not denied to him."

IN OHIO.

We propose next to insist further that the same doctrine is enunciated and enforced by the great weight of authority in the State courts.

In the case of *Summons v. State,* 5 Ohio St., 325, in which Ex-President Hayes appeared as counsel for the prisoner and contended for the doctrine supported by Mr. Uriel Wright in the Mc O'Blenis case (24 Mo.), that the testimony of *a deceased witness* is not admissible against the accused in a *criminal case,* the court said:

> "It is claimed, that the admission of testimony against the accused in a criminal case, to prove the statements given as evidence on a former trial of the cause, by a witness since deceased, contravenes the provision of the tenth section of the bill of rights, which provides that, '*in any trial, in any court, the party accused shall be allowed* [among other things] *to meet the witness face to face.*' This, like numerous other provisions in the bill of rights, is a constitutional guaranty of one of the *great fundamental principles,* well established, and long recognized at com mon law, both in England an in this country. The scope and operation of it are clearly defined and well understood, in the common-law recognition of it, and the assertion of it in the fundamental law of the State, was designed *neither to enlarge nor to curtail it in its operation, but to give it permanency, and secure it against the power of change or innovation.*
>
> "The object of this provision manifestly is to exclude testimony by depositions, by requiring it to be given orally, in the presence of the accused, on the trial. The admission of testimony by depositions against the accused in a criminal cause, would often afford the prosecutor great advantages over him, as well as furnish, at times, opportunities for abuses

beyond the reach of detection by the defendant. Deprived of this right, the accused would often be without the opportunity of cross-examination, without the means of seeing, hearing, or knowing the persons who testify against him, and without the advantage of an oral examination of the witnesses before the jury which is to decide upon his case. But important as this right is, as established at common law and secured by the Constitution, it has application to the matter of the personal presence of the witness on the trial, and not to the subject-matter of the competency of the testimony to be given. The requirement that the accused shall be confronted, on his trial, by the witnesses against him, has sole reference to the personal presence of the witnesses, and it in no wise affects the question of the competency of the testimony to which he may depose. When the accused has been allowed to confront, or meet face to face, all the witnesses called to testify against him on the trial, the constitutional requirement has been complied with. This was done on the trial of the case before us, in the district court. Mary Clinch was not a witness on that trial. Being dead, it was an impossibility that she could be a witness on that trial. Logan, however, who was a witness and did testify, did meet the accused face to face on the trial. The provision in the bill of rights was complied with. And the true question is, not whether the constitutional right of the accused was violated, but whether the testimony given by Logan on the trial was competent or not.

"There are several well-established exceptions to the rule that hearsay is not evidence. But if the right secured by the bill of rights applies to the *subject-matter of the evidence* instead of the *witness*, it would exclude, in criminal cases, all narration of statements or declarations made by other persons, heretofore received as competent evidence. The construction insisted on for the plaintiff in error, treats the person whose statements or declarations are narrated, as the

witness, rather than the person who testifies on the trial. This construction would exclude all declarations *in articulo mortis*, by confounding the identity of the dying man with that of the witness called upon in court to testify to such declarations. Precisely the same objection would exclude all declarations by co-conspirators—statements made in the presence of the accused in a criminal case, and not denied by him; and the statements by the prosecutrix in prosecutions for rape, made immediately after the commission of the offense. And, by a parity of reasoning, the admissions or confessions of the accused, and, in prosecutions for perjury, the very testimony of the accused on which the perjury may be assigned, would be excluded by the provision in the bill of rights forbidding that any person shall be compelled, in any criminal case, to be a witness against himself. * * * *

"Testimony of the statements of deceased witnesses given on a former trial between the same parties, touching the same subject-matter, has been admitted among the exceptions to the rule excluding hearsay evidence, from a very early period, and has been sanctioned by an unbroken current of decisions, both in England and in this country."

After carefully reviewing the authorities up to the date of the decision, the learned chief justice concludes with the statement that:

"These adjudicated cases, and the reasoning by which they are sustained, appear to me to take the question of the constitutional competency of this testimony *wholly out of the field of controversy.*"

### In Maine.

At a time when Dr. Appleton, the well-known commentator on the law of evidence, was *Chief Justice*, in the case of State v. Frederick, 69 Me., 400, the court took occasion

to observe, with reference to the provisions in the constitution of Maine, that in all criminal prosecutions the accused shall have the right to be confronted by the witnesses against him, that:

> "The defendant's counsel is right in saying that the constitutional provision referred to is but an authoritative declaration of a principle of the common law."....

### In Georgia.

We know of no decision in Georgia in derogation of the common-law rule. The matters under discussion are now regulated in that State *by statute.* (See Williams v. State, 19 Georgia, 402).

### In Tennessee.

The common-law rule, as we understand it, with its implied limitations, has been correctly announced by the supreme court of Tennessee since overruling the case in 1 Overton.

### In Virginia.

In *Finn v. The Commonwealth,* before the general court of Virginia, held:

> "A question, however, arises on this bill of exceptions, of a graver and more important character: it is, whether the evidence which *Chandler* gave on the examination, can be admitted *per se,* and independently of the prisoner's confession, *Chandler* having removed from the Commonwealth. In a civil action, if a witness who has been examined in a former trial between the same parties, and on the same issue, is since dead, what he swore to on the former trial,

may be given in evidence, for the evidence was given on oath; and the party had an opportunity of cross-examining him (Peake, 60; Phillips, 199). But we cannot find that the rule has ever been allowed in a criminal case; indeed, it is said to be expressly otherwise (Peake, 60, quoting Fenwick's case, 4 St. Trials). Nor can we find that the rule in civil cases extends to the admission of the evidence formerly given by a witness who has removed beyond the jurisdiction of the country; much less can it be admitted in a criminal case. We are all, therefore, of opinion, that there is error in the judgment of the court, as set forth in the first part o fthe bill of exceptions."

5 Rand., p. 708.

In *Brogy v. The Commonwealth,* before the court of appeals of Virginia September 5, 1853, adjudged:

"The second bill of exceptions presents the question, whether it was competent for the prisoner to prove what two persons had sworn to on a former trial of the cause; the witnesses having left the Commonwealth before the second trial, and being beyond the jurisdiction of the court? This question was presented and directly decided by the general court as far back as 1827, in Finn's case, 5 Rand., 701..... This decision has never been controverted in Virginia since. The whole criminal code has since undergone a revision, but the rule, as laid down in Finn's case, has been acquiesced in both by the courts and the legislature. I do not think it necessary therefore to go into the enquiry whether the rule was originally founded on proper principles or not. The rule has been established and recognized, and, I think, should be adhered to; and whether a foundation had been laid for its introduction or not, the evidence was properly excluded."

10 Gratt., 732.

## In North Carolina.

In State v. Valentine, before the supreme court of North Carolina, decided:

> "The first branch of the objection is as to the proof of the deposition. There is no direct provision in the act or in the statute of Philip and Mary, authorizing any use of the evidence when taken, or pointing out the mode, how it is to be authenticated. Under the statute it has been the constant practice in the English court, to permit the deposition to be read in evidence, after the *death* of a witness; and such has been the uniform practice in this State, and, indeed, both acts evidently look to such a use of it. For they require that the depositions taken according to their provisions, 'shall be returned to the office of the court, wherein the matter is to be tried.' To what purpose but to perpetuate them, and why perpetuate, but to provide for the contingency of the death of the witness, or to serve as a check upon him, if called into court as a witness thereafter. The depositions taken under the act, are legal evidence, to be used either in chief by either party, should the witness *die*, or upon the cross-examination of the witness in court (Westbeer's case, 1 Leach, 12; Smith's case, Russ and Ry. 339)."
>
> 7 Iredell, 226.

In State v. Grady, before the same court, determined:

> "The refusal of the court to permit the introduction of the examination of the witness, Williams, on behalf of the prisoner was correct and in strict accordance with the law as declared by the court in former adjudications.
>
> "In *State v. Young*, 1 Winst., 126, it is held that such examination is not competent evidence against a person on trial for homicide. But the very point is decided in the subsequent case of *State v. Taylor*

(Phil., 508), where the examination of the witness before a coroner's jury was offered and rejected. 'The objection to the evidence,' says Battle, J., speaking for the court, 'was put upon two grounds: 1st, that the testimony was irrelevant, and 2d, that it was not shown by the prisoner that Wheeler (the witness) was dead, or what had become of him. His Honor rejected the evidence without stating his reasons for it. We are inclined to think that either ground of objection was sufficient and we are entirely satisfied that the last was.'

"The same principle had been previously applied to examinations before committing magistrates in State v. McLeod (1 Hawks., 455, and State v. Valentine, 7 Ired., 225).

83 N. C., 645.

IN MISSISSIPPI.

Dominges v. State, 45 American Decisions, 316, heard before the supreme court of Mississippi, maintained:

"The substitution of depositions for oral testimony belongs to civil trials. In no state of circumstances, under our constitution, can a deposition of a witness be used against an accused in a criminal prosecution, and a similar rule seems to hold as to the depositions of witnesses in his favor, unless by his consent. The system of criminal jurisprudence appears to require the *presence* of the witnesses, both for and against the accused. Very often, in such prosecutions, much depends upon the appearance, manner and mode of testifying of a witness, and it is this that adds the superior character and importance to oral testimony."

7 Smedes v. Marshall, 475.

In Owens v. The State, before the same court, it was declared:

"The proposed evidence to show what the absent

witness, Swartz, had sworn on the *habeas corpus* trial was not admissible. It is well established that the testimony of a deceased witness, given under oath in a judicial proceeding between the same parties on the same issue, is competent, both in civil and criminal cases, for either party, when the party against whom the testimony is offered had the opportunity to cross-examine the witness on the former proceeding (1 Greenleaf Ev., 163; 1 Whart. Cr. L., 667; Strickland v. Hudson, 55 Miss., 235; Commonwealth v. Richards, 18 Pick., 434; Summons v. State, 5 Ohio St., 325; Barnett v. State, 34 Ill., 325).

"But whatever may be the rule in *civil actions* as to the admission of evidence to prove what was sworn by a witness on a former trial between the same parties when such witness is alive but has removed from the State, or is beyond the jurisdiction of the court, such evidence is excluded on *criminal trials* (State v. Houser, 26 Mo., 431; Collins v. Commonwealth, 12 Bush., 271; People v. Newman, 5 Hill (N. Y.), 295; Finn v. Commonwealth, 5 Randolph, 710; Brogy v. Commonwealth, 12 Gratt., 722; Gehauser v. North British Ins. Co., 7 Nev., 175)."

Dukes v. State, decided in the same State April 7, 1902, held:

"It will be noticed that this State admits the testimony in but one case, to-wit, the *death* of the witness. Mr. Bishop says, in 1st New Cr. Proc., 732, note 7, 'such is, by all opinions, the doctrine in civil cases,' but there may be a State or two wherein it is not received in criminal cases. Citing Owens v. State, 63 Miss., 450; Finn v. Com., 5 Ran., 701. It doubtless would be well for our legislature to enact that all testimony should be received in all the categories mentioned in section 1195 of Dr. Bishop's work; adding the case of a witness made incompetent to testify since he delivered his testimony on the former trial.

This court has held strictly to the rule of admitting such evidence, only where the witness has *died*. This shows the necessity for extreme caution in application of the rule in this State."

31 Southern R., 745.

IN MASSACHUSETTS.

In *Warren and Another v. Nichols,* the Massachusetts court decided:

"The rule upon which evidence may be given of what a deceased witness testified on a former trial between the same parties, in a case where the same question was at issue, seems now well established in this Commonwealth by authorities. It was fully considered in the case of *Commonwealth v. Richards*, 18 Pick., 434. The principle on which this rule rests was accurately stated, the cases in support of it were referred to, and with the decision of which we see no cause to be dissatisfied. The general rule is, that one person cannot be heard to testify as to what another person has declared, in relation to a fact within his knowledge, and bearing upon the issue. It is the familiar rule which excludes hearsay. The reasons are obvious, and they are two: First, because the averment of fact does not come to the jury sanctioned by the oath of the party on whose knowledge it is supposed to rest; and secondly, because the party upon whose interest it is brought to bear, has no opportunity to cross-examine him on whose supposed knowledge and veracity the truth of the fact depends.

"Now, the rule, which admits evidence of what another said on a former trial, must effectually exclude both of these reasons."

6 Met., 264.

In *Commonwealth v. McKenna,* before the supreme judicial court of Massachusetts, Middlesex, March 1, 1893, held:

"We are of opinion that the evidence recited in the exception was sufficient to warrant the verdict of the jury. The remaining exception is to the refusal of the court to permit a witness to testify to what Mrs. Kearns testified to at the trial of this case in the district court, she being ill, and unable to be present at the trial in the superior court. The court heard her testimony, and we *assume* that it was material. On this question there is a conflict of authority in other jurisdictions, but here, so far as we know, the practice has been to confine such testimony to cases where the witness has died; and we think the weight of authority elsewhere in criminal cases, is that the rule should not be extended to cases where the witness is ill at the time of the trial (Com. v. Richards, 18 Pick., 434; State v. Staples, 47 N. H., 113; People v. Nawman, 5 Hill, 295; Yale v. Comstock, 112 Mass., 267; Costigan v. Lunt, 127 Mass., 354; C. Le Baron v. Crombie, 14 Mass., 234; Chase v. Mills Co., 75 Me., 156; U. S. v. Angell, 11 Fed. Rep., 34; Collins v. Com., 12 Bush, 271. See Reynolds v. U. S., 98 U. S., 145; 1 Greenl. Ev., par. 163, 165; Best Ev. (Chamberlayne's ed.), par. 496, note; Wharton Crim. Ev., par. 227 *et seq.;* Bish. Crim. Proc., par. 1196; 1 Tayl. Ev., par. 477 *et seq*q. The decision in Le Baron v. Crombie, *ubi supra*, has never been overruled, and the statutes since passed relating to evidence and witnesses seem not to touch the question there considered.

"Exceptions overruled."

33 N. E. Rep., 389.

### In Wisconsin.

In *Williams v. State*, before the supreme court of Wisconsin, October 14, 1884, adjudged:

"It is also alleged as error that the evidence of Dr. Hubbell, taken at the inquest, was permitted to be read in evidence on the trial. The evidence was read by the consent and stipulations of both the State and

the attorney for the accused. No exception was taken to its being read on the trial, and the rule in criminal proceedings is the same as in civil, that, in order to protect himself against the reception of improper evidence on the trial, exception must be taken (Rollins v. State and State v. Clifford, *supra;* 1 Bish. Crim. Pro., 117, 119). But it is said that, as the Constitution provides that the accused shall enjoy the right to meet the witnesses face to face, he cannot waive that right, and therefore the stipulation of the counsel that it might be read goes for naught.

"It is well settled that the accused may waive his right to be confronted with the witnesses on the trial (1 Bish. Crim. Proc., 117, 118, 119, 1205; State v. Polson, 29 Iowa, 133; Hurley v. State, 29 Ark., 17; State v. Bowen, 4 McCord, 254; Johnson v. State, 27 Texas, 758; Miller v. State, 25 Wis., 384)."

21 North Western R., 61.

### In New Hampshire.

In *State v. Staples,* before the New Hampshire court, determined:

"Mrs. Warren, wife of the prosecutor, testified on the former trial in behalf of the State, but being sick at the time of the last trial, the respondent offered to prove what she had testified on the former trial. The court rejected the evidence, and defendant excepted. We have not known a practice in this State where the witness is *alive* and within the jurisdiction of the court, and in criminal proceedings, to allow the former statements of the witness to be used. Such testimony is admitted at any time only upon urgent necessity, and in violation of the familiar rule that the best testimony is to be used, and it would be an anomaly in our practice to introduce the produced former statements of a living witness through a copyist or a bystander. The evidence of a witness in the same cause and at a former trial is not admissible

until it has been first proved that he his *dead* (King v. Jolliffe, 4 Term. Rep., 290; Powell v. Waters, 17 Johns., 176; Wilbur v. Seldom, 6 Cow., 162; Le Baron v. Crombie, 14 Mass., 234; Bull. N. P., 242). In criminal proceedings especially this rule will be strictly enforced. In many jurisdictions the proof of the death of the witness will not justify the use of his former testimony (People v. Newman, 5 Hill, 295; Farrell v. Warren, 3 Wend., 257; Finn v. Commonwealth, 5 Rand., 708; State v. Atkins, 1 Over., 229; 2 Hawk. P. C., secs. 12, 606; 1 Phillips on Evidence, 199). It seems to be questioned by high authorities if such testimony be admissible at all (Jackson v. Baily, 2 Johns., 17).

"Judgment on the verdict."

17 N. H., 115; 90 Am. D., 568.

### In Montana.

In *State v. Lee*, before the supreme court of Montana, July 31, 1893, held:

"Section 16, art. 3, of the constitution, is in part as follows: 'In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation; to meet the witnesses against him face to face.' We find in the criminal practice act the following provisions: 'Sec. 9. In a criminal action the defendant is entitled: ..... Third, to produce witnesses in his behalf, and to be confronted with witnesses against him, in the presence of the court.' In this case this constitutional and statutory right of defendant was wholly denied. As appears in the statement of the case above, material evidence was produced against the defendant, not from the mouth of the witness of the facts (which witness was out of the jurisdiction), but from the mouth of a witness who purported to relate his general recollection of what the witness of the facts had testified on the pre-

liminary hearing before the committing magistrate. The provisions of the constitution and the statute above cited seem to have been overlooked. Section 16, art. 3, Const.; section 9, Crim. Pr. Act. The State makes no appearance, and files no brief in this case. Among other authorities presented by appellant we note as particularly in point as to their facts the following: Bergen v. People, 17 Ill., 426; U. S. v. Angell, 11 Fed. Rep., 34. The judgment is reversed, and the case is remanded for new trial."

33 Pac. R., 691.

IN MISSOURI.

In State v. Houser, the Missouri court decided:

"The point made in this case we do not, however, consider determined by the case of McO'Blenis. It may be that, so far as the constitutional provision referred to is concerned, the reason for admitting the deposition is just as conclusive in the one case as the other. If the witness is beyond reach of process, his presence is as utterly unattainable as though he were *dead*. But it does not follow that every kind of evidence, which this provision of our constitution does not exclude, is therefore legitimate testimony. The constitution did not propose to lay down specific rules of evidence. Its framers only thought it necessary to declare general principles. To determine whether any particular testimony is to be admitted or excluded, we must look to the law as well as to the constitution. Although it may not conflict with the the constitution, it does not follow that it is therefore competent evidence. The admissibility of depositions in civil and criminal cases depends upon different grounds. It has been urged in this case that, with the exception of the constitutional provision which has been referred to, they both occupy the same grounds. Such is not understood to be the law. If it was, then the deposition or testimony taken before the examining

court would be admissible in every case where the witness was prevented by bodily infirmity from attending court, or was at the time of trial more than sixty miles from the place of trial, or was a judge engaged in his official business. This question is to be determined by the common law, and not by our statute, which applies only to civil cases.

"In England no authority is to be found, so far as this examination has discovered, where, in a criminal case, a deposition, taken under the statutes of Philip and Mary, was admitted merely because the witness was beyond seas or out of the reach of process of the court. In Morley's case, 2 Kelyng, 55, the resolution of the judges was that in case of death or absence by procurement of the prisoner or his friends, or in case of sickness from which there was no probability of recovery, the deposition could be used. It was at the same time held, that it was not sufficient to show that endeavors had been used to find the witness and that he could not be found. In Buller's N. P., 242, it is said that 'if the witnesses examined in a coroner's inquest be dead or beyond sea, their depositions may be read, for the coroner is an officer appointed on behalf of the public to make inquiry about the matters within his jurisdiction.' This remark has been questioned, both as it related to depositions before coroners when the accused was not present, and especially so far as it declares that the mere absence of the witness will admit the deposition (2 Starkie, 4, 491; Phillips' Ev., 373). The authorities cited by Buller to support this position are Bromwich's case, 1 Lev., 180, and the case of Thatcher & Waller, T. Jones, 53. In Bromwich's case the witness was dead, and there was therefore no such question before the court, and in Thatcher and Waller the deposition was one taken before the coroner, and, as we have seen, some peculiar importance was attached to the proceedings of this officer, and the court said that if the deposition had been taken *before a magistrate* it could not have

been read. In *Rex v. Huyon,* 8 Carr. & P., 167, a deposition was offered, the witness *being beyond seas,* and Coltman, J., said that it was inadmissible unless by consent."

26 Mo., 439.

IN IOWA.

*State v. Collins,* before the Iowa Court, was to this effect:

"The Constitution of the State, which is paramount in authority over an act of the General Assembly conflicting with it, provides, that 'in all criminal prosecutions, and in cases involving the life or liberty of an individual, the accused shall have the right to a speedy public trial by an impartial jury; to be informed of the accusation against him; to have a copy of the same when demanded; *to be confronted with the witnesses against him;* to have compulsory process for his witnesses; and to have the assistance of counsel' (New Const., par. 10, art. 1).

"Here is a clear and express declaration of the *right* of the defendant 'in a criminal prosecution,' 'to be confronted with the witnesses against him.' This right to have them brought into court, where he can see them, while they give evidence against him, *is secured* by this constitutional provision. Their testimony can be given only upon the trial of the cause, and face to face with the accused; and *any act of the Legislature* purporting to authorize depositions of witnesses, taken out of court, to be used against a party on trial in a criminal case, would be in conflict with this section of the Constitution, and therefore, void. The minutes of evidence admitted in this case do not rise even to the dignity of a deposition; but, if they did, it would have been error to admit them as original evidence, because incompetent in view of the above clause of the Constitution."

32 Ia., 40.

### In Michigan.

In *People v. Murray,* before the Michigan Court, it was said:

> "The defendant undoubtedly had a constitutional right to be confronted with his witnesses. He waived that right in this case, apparently for his own supposed advantage and to obtain evidence on his own behalf. It would have been a mere impertinence for the court to interfere and preclude the stipulation being acted upon. But it would have been more than an impertinence; it would have been gross error. And it would be palpable usurpation of power for us now to set aside a judgment for neglect of the court, not at the time complained of, but in respect to something where any other course would have been plain error."
>
> 52 Mich., 290.

### In Illinois.

The Supreme Court of Illinois, in *Bergen v. People,* declared:

> "The court permitted the people to prove what Phebe swore to, on the examination of the defendant before the magistrate, for the same offense, the defendant objecting. The record shows, that there was evidence tending to prove that the defendant *had taken the witness out of the State,* to deprive the People of her testimony; and it was proved that she had been for some months beyond the limits of this State. Where a witness has testified on a former trial of the same cause, or where the same matter was in issue, between the same parties, and the witness has since died, what such witness swore to on the former occasion may be given in evidence.
>
> "Here the witness was not dead, but beyond the jurisdiction of the court, by the procurement of the defendant; and we think the rules of evidence do not

permit, in such case, the admission of the testimony given on the former occasion (State v. Atkins, 1 Tenn. [Overton], 229; The People v. Newman, 5 Hill, 295; Finn v. Commonwealth, 5 Randolph, 701, 708; Wilbur v. Seldon, 6 Cow., 162; Hobson v. Doe, 2 Blackf., 308; Chess v. Chess, 17 Serg. and Rawle, 409; 4 Yates, 512; Le Baron v. Crombie, 14 Mass, 234; 2 Starkie's Ev., 894). Some of the authorities hold that, *in a criminal proceeding,* this kind of evidence is not admissible, although the witness be *dead;* but it is not necessary for us here to decide this question. It is true, if a party, in any case, *spirits* away his adversary's witness, he ought not to profit thereby; or, at least, suitable penalties should be provided against such conduct, but it is for the Legislature to correct the evil." 17 Ill., 426.

In *Hoyt v. People,* before the same court, held:

"It is enacted by Section 1 of 'An act to regulate the granting of continuances in crimnial cases,' approved June 26, 1885 (Laws 1885, p. 73), 'that, when affidavit is made for continuance in behalf of the People or any defendant in a criminal case on the ground of the absence of a material witness, the State's attorney or the defendant, as the case may be, shall not be required to admit the absolute truth of the matter set up in the affidavit for continuance, but only that such absent witness, if present would testify as alleged in the affidavit; and, if it is so admitted, no continuance shall be granted, but the case shall go to trial, and the party admitting the same shall be permitted to controvert the statements contained in such affidavit by other evidence, or to impeach such absent witness, the same as if he had testified in person: *Provided,* That the court may, in its discretion require the opposite party to admit the truth, absolutely, of any such affidavit, when from the nature of the case he may be of the opinion that he ends of justice require it: *Provided, further,* That this act shall not apply to

applications for continuances at the same term of court at which the indictment was found or information filed (Rev. St. 1891, c. 39, par. 428*a*). The indictment in this case was found at the March term, and the application for continuance was made at the following October term, of court, and the ruling of the court below was determined *within the letter of the statute.* That is not denied by counsel for plaintiff in error, but they contend that this statute is within the inhibition of so much of Section 9, Article 2, of our Constitution, as guarantees that 'in all criminal prosecutions the accused shall have the right.....to meet the witness face to face, and to have process to compel the attendance of witnesses.' Surely this statute does not deny to the accused the right to meet the witnesses testifying against him face to face. He is not compelled to admit the facts stated in the affidavit on behalf of the People; and if he shall not do so the State's attorney *cannot read them in evidence to the jury,* but must produce the witness, so that the accused can meet him face to face. If, however, the accused shall prefer to have the facts read in evidence to the jury, rather than that the trial shall be postponed, he may do so; for he may by a plea of guilty, or by a confession in open court, waive the production of all evidence of his guilt."

30 North Eastern, 316.

### In California.

The Supreme Court of California, August 11, 1893, in *People v. Gordon,* determined:

"At the first trial, C. H. Potter, the prosecutor, was examined as a witness for the People, and his testimony was taken down by the shorthand reporter, and thereafter correctly transcribed by him. At the second trial, proof was introduced by the prosecution, showing that the witness, after due diligence, could not

be found within this State. Thereupon the District Attorney attempted to introduce in evidence the deposition of Stone taken in the preliminary examination. The deposition was rejected by reason of the defective certificate thereto, and thereupon the stenographer, Briar, was called, and testified as to the evidence given by the witness Stone at the preliminary examination. One of the objections made to the admission of the evidence was that the evidence of an absent witness, given at the preliminary examination, could only be used at the trial by the introduction of his deposition taken at that time. Both reason and authority sustain this position. To permit the testimony of an absent witness to be given to the jury through the medium of the recollection of a bystander at the hearing (and the reporter occupied no different position) is to deprive defendant of the right to be confronted by the witnesses, and to place before the jury the purest hearsay. While hearsay testimony, under certain peculiar circumstances, is allowed to be placed before the jury, the facts here divulged by the record do not place this case within the exceptions to the general rule. Whatever may be the rule of evidence regarding these matters in civil action, as declared by Section 1879, subd. 8, Code Civil Proc., that rule has no application to criminal cases. Sec. 1102 of the Penal Code provides, 'The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this code;' and as to these matters it is very apparent that the Penal Code *otherwise provides*. Sec. 686 declares the rights of a defendant in a criminal action; and subdivision 3 thereof provides: 'To produce witnesses on his behalf, and to be confronted with the witnesses against him in the presence of the court, except that, where the charge has been preliminarily examined before a committing magistrate, and the testimony taken down by question and answer in the presence of the defendant, who has either by person or by counsel had an opportunity to examine the wit-

ness ..... the deposition of such a witness may be read upon it being satisfactorily shown to the court that he is dead or insane, or cannot, after due diligence, be found within the State.' The law thus states that the defendant is entitled to be confronted with the witnesses against him, in the presence of the court, with but a single exception, and this case is not that exception. By rejecting the official notes the court in effect held that it was not a deposition; and, that fact being established, the exception provided by the statute requiring the presence of the witness in the court at the trial who was not present, and the witness' knowledge of the facts of the case could only have been produced before the jury with his own lips. This question was directly adjudicated upon, and the foregoing views supported in People v. Chung Ah Chue, 57 Cal., 567, which decision was followed in People v. Qurise, 59 Cal., 343. In those cases it was held that the official report of the witness' evidence as given at a previous trial could not be received before the jury, as it failed to come within the exception found in subdivision 3, par. 686, already quoted. If such evidence is not allowed to go before the jury, for the same reasons the recollection of persons present, as to what the witness said at the preliminary examination is doubly objectionable. It is intimated in People v. Carty, 77 Cal., 213, 19 Pac. Rep., 490, that this character of evidence is admissible, but the intimation was purely voluntary, and was not demanded by the exigencies of the case. The rule in civil actions evidently possessed the mind of the learned commissioner at the time he threw out the suggestion. No authority has been called to our attention, decided since the adoption of the codes, that justifies the admission of the evidence here introduced. The remaining objection to the admission of the evidence of the witness, Briar, does not seem to be well founded in view of the provision of Sec. 2047 of the Code of Civil Procedure."

32 Pac. R., 882.

IN PENNSYLVANIA.

In *Brown v. Commonwealth*, before the Pennsylvania Court, adjudged:

"On the preliminary hearing before the committing magistrate, the defendant and his counsel being present, a witness was examined whose testimony was taken down by defendant's counsel, and the witness having died before the trial, the notes of his evidence proved by the counsel under oath, were offered in evidence, objected to and admitted. It was objected that by the constitution of the State, the defendant was entitled to meet the witness face to face.

"The doctrine on this subject is thus laid down in the third volume of Russel on Crimes by Greaves, 4th ed., 1865, 249. 'If there has been a previous criminal prosecution between the same parties, and the point at issue was the same, the testimony of a deceased witness given upon oath at the former trial, is admissible upon the subsequent trial, and may be proved by any one who heard him give evidence.' And the same is repeated at page 424 in the note. We find the same rule in 1st Phillips & Arnold's Ev., pages 306 and 307, and 1st Pitt Taylor on Evidence, 4th ed., 1864, pages 445, 447. Dr. Wharton in his valuable treatise on criminal law in the United States, vol. 1, page 667, says: 'The testimony of a deceased witness given at a former trial or examination, may be proved at a subsequent trial by persons who heard him testify. Even the notes of counsel of the testimony of such witness on a former trial between the same parties touching the same subject-matter, are evidence when proved to be correct in substance, although the counsel does not recollect the testimony independently of his notes. The better opinion seems to be, that it is sufficient to prove the substance of what these witnesses said, provided the material particu-

lars are stated, though it has been sometimes held, that unless the precise words could be given, the testimony would be rejected.'

"In the Commonwealth v. Richards, 18 Pick., 434, it was held that the 12th article of the declaration of rights, which provides that in criminal cases the accused shall have the right 'to meet the witnesses against him face to face,' is not violated by the admission of testimony in a criminal trial before a jury to prove what a *deceased* witness testified at the preliminary examination of the accused before a justice of the peace.'

"This case was affirmed seven years afterwards in Warren v. Nichols, in 6 Metc., 261, and the further ruling in that case 'that the whole of the testimony of the deceased witness upon the point in question, *and the precise words used by him* must be proved,' was substantially affirmed. Hubbard, justice, dissented from this ruling and assigned very cogent reasons against it. 'As the decision now stands,' says this able judge, 'it prescribes a rule for the admission of testimony, which the imperfection of our nature, in the construction of our memories, will not warrant. It in truth excludes the thing it supposes to admit, and at the same time opens the door for knaves to enter, where honest men cannot approach.'

'Other learned judges have maintained, that a rule so rigid was unwise, and I confess, I prefer the reasoning of Gibson, J., in the case of Parnell v. Green, 10 S. & R., 16, to that of the learned judge in Commonwealth v. Richards, and with him agrees also the learned author of the *Treatise on the Law of Evidence'* (1st Greenl., page 165).

"Upon this subject the ablest discussion of this whole question is to be found in the opinion of Judge Drummond, in The United States v. Lacombe, 5 McLain's Rep., 286, delivered in the Circuit Court of the United States for the district of Illinois, at July term

1851. At the preliminary examination a witness, since *deceased*, testified in relation to the offense, which was robbing the mail. The accused was present, and his counsel cross-examined the witness. Witnesses were permitted on a trial before a jury, under an indictment found for the same offense, to prove what the *deceased* witness testified to at the preliminary examination. It is sufficient in such a case to prove substantially, all that the deceased witness testified upon the particular subject of inquiry. A decision upon the same point is to be found in United States v. White, 5 Cranch's Circuit Court Rep., 460.

"The Sixth Article of the Amendment of the Constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right 'to be confronted with the witnesses against him.'

"The Constitution of Pennsylvania of 1776, provided: 'That in all prosecutions for criminal offenses a man hath a right to be confronted with the witnesses.' The declaration of rights in the Constitution of 1790, changed the phraseology from confronting 'to meet the witnesses face to face.'

"The doctrine enunciated by Judge Drummond in 1851 was followed by the Supreme Court of Missouri after a very exhautive argument on the constitutional question, in The State v. McO'Blenis, in 24 Missouri (3 Johns) 402, and State v. Baker, *id.*, 437 in 1857, and in The State v. Hauser, 26 Missouri (5 Jones) 431, in 1858, and by the Supreme Court of Ohio in Summons v. The State, in 5 Ohio (N. S.), 325 in 1856.

"In this State the most liberal rule has been adopted in relation to the evidence of what was testified to by a *deceased* witness on a former trial or examination, as will be seen by referring to Cornell v. Green, 10 S. & R., 14; Chess v. Chess, *Id.* 409; Moore v. Pierson, 6 W. & S., 50, and Ryan v. Robertson, 3 Casey, 30, in which Chief Justice Lewis said: 'The notes of counsel, showing what a *deceased* wit-

ness testified to on a former trial between the same parties touching the same subject-matter, are evidence when proved to be correct in substance, although the counsel did not recollect the testimony independent of his notes, and although he did not recollect the cross-examination.' To which may be added the decision in Phila. & Reading R. R. v. Spearen, 11 Wright 306, the opinion being delivered by my brother Agnew.

"There was, therefore, no error in the court admitting the notes of Mr. McCool of the testimony of Ewing, a deceased witness, in the examination before the committing magistrate, or the notes of any other counsel, or those of the committing magistrate himself."

73 Penn. St., 325.

### In Kentucky.

In *Kean v. Commonwealth,* the Kentucky Court held:

"The evidence in the case was taken down on the last trial, and adds nearly one thousand pages to the record and it might well happen that the substance of all that was said by the witnesses was not contained in the bill of evidence. It is a constant occurrence for counsel on opposite sides to disagree as to what a witness has sworn to, both recollecting with equal clearness and the court determining the issue between them more with the view of having the legal questions arising presented properly to this court than to get the substance of all witness said. Even those who are present and favorably inclined to one party are very apt to make the language used by the witness conform to their own wishes, and hence the absolute necessity of giving to the accused, when his life or liberty is involved in the issue, the right of cross-examination. This right of the accused to confront the witness testifying against him is declared in both the

> Federal and State constitutions, and doubtless in the constitution of every State in the Union, a right indispensable to the citizen when his life or liberty is involved, and the admission of this silent witness is, in our opinion, in plain violation of the twelfth section of the bill of rights (5 Ohio, 354; 10 Hunn., 486; Walston v. Com., 16 B. Monr., 15)."
>
> 10 Bush., 190; 19 Am. R., 66.

And in *Collins v. Commonwealth* the same court declared:

> "The appellant cannot complain that he was not permitted to prove the statements made by the witness Duncan on a former trial. The witness was absent from the State, and his place of residence was unknown; but these facts did not entitle him to make the proposed proof. Whatever may be the rule as to the testimony given by an absent witness on a former trial in a civil action, it cannot be proved on a criminal trial. The courts allow proof of such testimony when the witness is dead, but we are not advised that the rule has ever been extended so far as to permit either the Commonwealth or the accused to prove the statements of a witness upon the sole ground *that he was absent from the State beyond the territorial jurisdiction of the court.*"
>
> 12 Bush., 190.
>
> 19 Am. R., 66.

It is admitted that the methods by which justice is administered are subject to constant fluctuation, and that the people of each State may adopt such systems of laws as conform to their traditions and customs.

But while this is true, it is also certain that *the cardinal principles of justice are immutable,* and that any system

adopted must conform to those *fundamental principles laid down in the Constitution of the United States*, to which each member of the Union is bound to accede as a condition to its admission as a State." In our judgment execept in matters of *procedure*, every guaranty written in the *Bill of Rights* of the Federal Constitution and of the Constitution of the State of Louisiana, is *irrevocable*, and not subject to limitation or qualification otherwise than in the exceptions understood to have been recognized at the time of the adoption of those instruments.

Be this, however, as it may, it is quite certain that no authority has ever undertaken to go further than to declare that the right to abridge or modify in certain particulars, some of the *rights* enumerated, finds its sanction in some express *constitutional* or *statutory* provision.

In Louisiana, not only does the organic law provide with reference to criminal prosecutions, that "in *every instance* the accused shall have the right to be confronted with the witnesses against him," but, by mandatory statute it is declared:

> "All crimes, offenses and misdemeanors shall be taken, intended and considered *according to and in conformity with the common law of England;* and the forms of indictment, (divested, however, of unnecessary prolixity), the method of trials, the *rules of evidence*, and *all other proceedings* whatsoever in the prosecution of crimes, offenses and misdemeanons, changing what ought to be changed, *shall be according to the common law*, unless otherwise provided."
>
> Rev. Stat. Sec. 976;
> Acts of 1885, p. 151;
> Acts of 1805, p. 440.

By a uniform current of authorities it is fixed in the jurisprudence of Louisiana that the provisions of what now constitutes Sec. 976 of the Revised Statutes of that State, are understood to mean the English Common Law, as it stood in 1805. As we have had occasion to demonstrate, in 1805 the Statutes of *Philip and Mary* were still in force and so continued until repealed and re-enacted by the Statute of *7th George IV*, passed in 1827. It is not therefore in the power of a State by constitutional provision or by mere statutory enactment, to modify, abridge or destroy the substantial and fundamental rights guaranteed in respect of those privileges and immunities inherited from our British ancestors and consecrated in the *Magna Charta*, which are involved in the issue raised in this court. It is simply a question as to the power of the judiciary to disregard the "law of the land," in so far as Louisiana is concerned, and, in this sense, it is the denial to plaintiffs in error of "due process of law," that is in contestation.

In fact, as we have had occasion to observe: "These statutes of Philip and Mary were received as common law in Louisiana."

35 So. Rep. 959.

The constitution of the State, (copied from that of the United States,) guarantees to accused parties the right, in every criminal case, to be confronted with the witnesses against them. By express legislative act it is enjoined that in all criminal trials the rules of evidence and the methods

of procedure shall be according to the *English* common law as it stood in 1805. Under the *English* common law at it stood at that period, and under the *English* practice as it continues down to the present time, the absence of a witness, even though he be a foreigner and a resident in a foreign state, is not sufficient cause for denying to the accused the right to meet the witnesses against him *face to face.*

This being the law, is it possible that by a mere *brutum fulmen,* in utter disregard of the constitutional guarantees, any court can be permitted to deprive the citizen of his fundamental, constitutional rights, and still the result be considered as "*due process of law?*"

Mr. Justice Peckham, speaking for the court in *Maxwell v. Dow,* said:

> "As stated by Mr. Justice Brewer in delivering the opinion of the court in Brown v. New Jersey, 175 U. S. 172: The State has full control over the *procedure* in its courts, both in civil and criminal case, subject only to the qualification that such procedure *must not work a denial of fundamental rights or conflict with the Constitution.*" 176 U. S., 581, 605.

We submit that under the Constitution of the State of Louisiana, and the rule of the Common Law, which by constitutional and by statutory mandate is written into the judicial system of that State, the procedure of the courts in this case, *did* work a denial of the fundamental rights guaranteed to the citizen in its organic law, and that these are protected from abuse and infraction by the *Fourteenth Amendment* to the Constitutionof the United States.

Again, we ask: Where the Constitution grants a fundamental right, and a court arbitrarily withholds it, has there been "*due process of law?*"

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HENRY L. LAZARUS,

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# APPENDIX.

## VIEWS OF MR. URIEL WRIGHT UPON THE CONSTITUTIONAL PROVISION AS TO THE CONFRONTATION OF WITNESSES.

Conspicuous among the most celebrated of representative lawyers at the American bar in the 50's, was Uriel Wright, Esq. the recognized leader of the Missouri bar; and so impressed were we with the persuasiveness and—conceding his premises—unanswerable logic of his argument in the case of McO'Blenis, which has been referred to by Mr. Justice Brown of this court as "a most learned discussion of the subject," (Mattox *v.* United States, 156 U. S.) that we have been impelled to present it to the court for its consideration.

The necessities of the McO'Blenis case carried Mr. Wright in his zeal beyond the true principle controlling—that in the grant of the right of the confrontation of the accused by the witnesses against him, there was implied those exceptions—as well known as the rule itself—which apply to dying declarations and to the death of a witness once confronted with the accused. The deposition of Nievergelder, a witness examined before the committing magistrate, who died before the jury trial, was admitted by the ruling of the majority of the court, Mr. Justice Ryland, in a well-considered opinion, dissenting from the views entertained by the majority.

Granting the implied limitation which should have been conceded both by Mr. Wright and Justice Ryland, the argument of the former, we submit, carries with it the force of demonstration.

The court that sat in judgment on the McO'Blenis case

has always been recognized as Missouri's ablest supreme court, and Mr. Justice Leonard, who was its organ, has been accorded by the profession pre-eminence among the judges of Missouri.

Robert McO'Blenis was indicted at the April term of the St. Louis criminal court, in the year 1855, for the murder of Benjamin F. Brand. The indictment contained but one count, and that was for murder in the first degree. The cause was taken by change of venue to the St. Louis circuit court.

Upon the trial, the State *offered to read in evidence the deposition of Louis Nievergelder*, a witness sworn and examined on behalf of the State on the examination of the defendant before Mann Butler, the committing magistrate, on the charge of feloniously shooting and killing Benjamin F. Brand, being the same charge for which the defendant was afterwards indicted and was then being tried. The said Nievergelder had departed this life since his examination before the committing magistrate. It was admitted by the defendant that the witness testified before the magistrate on oath, in the presence of the defendant, and was cross-examined by the defendant; that his testimony was reduced to writing by the magistrate, and that the witness signed the same; that the paper offered was the testimony of the witness, so reduced to writing and signed by him and returned by the magistrate, taking the same and committing the defendant to jail without bail, duly certified and delivered to the jailor, accompanying the warrant of commitment; and that the witness was dead since his examination as aforesaid; and all preliminary proof was waived by the defendant, the only objection made by the defendant being as to the competency of said testimony, the witness being since deceased. But the defendant objected to the reading of the paper, because it was not legal evidence against him under the constitution of this State. The court overruled the ob-

jection, and permitted the paper to be read in evidence. Exceptions were duly taken.

The jury rendered a verdict in the following form: "We of the jury find the defendant guilty of murder in the second degree, and assess punishment to imprisonment in penitentiary for ten years."

A motion for a new trial having been overruled, the defendant appealed.

*Uriel Wright, Esq., argued the case for a reversal.*

I. The introduction of Nievergelder's deposition was a violation of the bill of rights of the people of Missouri in both the letter and the spirit of that instrument. In our declaration of rights it is said, "In all criminal prosecutions the accused has the right to meet the witness against him face to face." (Art. 13, sec. 9.) Now whatever these words may mean, it is at least certain that what they secure to the accused is beyond the control of any department of the government. The General Assembly cannot abrogate it by statute, nor can the courts judicially legislate it away. The thing secured is above all the "discretion" of courts, sound or unsound--above all "policy" of legislatures, wise or foolish. Whatever may be the right given by the words, it is a fixed right. It exists intact, or not at all. It cannot be halved, quartered, or in less degree subdivided. It cannot be made to yield to expediency or necessity. No court has power to say of it "We give the right in part; what is withheld, is from necessity." Within the circle of expediency, policy and discretion, courts may hold such language; but it is not constitutional language touching a constitutional right. What is the right secured by the words? I hold it to be nothing more, nothing less, nothing other, than the permanent establishment, by the fundamental law, of the *status* of every witness against the accused in a criminal prosecution.

It is a transparent mistake to confound this right with any

*rule of evidence.* No rule of evidence is established by it, nor is any such object aimed at. The relative position of the "witness" and the accused is established, but what the witness may lawfully swear from that position is *not* established. That is left to the courts, and is regulated by them under the system known as the rules of evidence. But whatever it may be lawful for the "witness" to swear against the accused under those rules, must be heard from his position fixed by the constitution. If the witness be not in that position assigned him by the constitution, he cannot be heard at all. Nor does this provision of the bill of rights decide whether the "witness" shall be sworn; nor how he shall be examined or cross-examined; nor whether there shall be any cross-examination at all. Such questions must find their answers outside of the constitution, or at least outside of this provision of it.

The "accused" shall *meet* the "witness face to face"—he shall thus meet him in "all criminal prosecutions;"—that is the right. A meeting might involve only presence, contiguity; but that is not enough. It shall be a meeting in the mode and fullness in which man must meet his God in the day of final judgment, and that is "face to face." The whole purpose of the provision is to thwart falsehood. If perjury were impossible, the provision would be without meaning. Two objects were secured by the words: first, the witness must look upon the accused, the intended victim of a false oath, that he may see the value of what he is about to destroy, and the accused shall look upon the witness as he swears; second, the triers shall look upon the false witness and gather the perjury from his aspect. The means are simple, but human experience has established their efficacy as tests of truth. They invoke only moral power, but that after all is the highest power. It is hard to say which of the two instrumentalities is the greater. "And the Lord turned and *looked* upon Peter;" "and Peter went out and wept bitterly." (Luke, chap. 22.) When affidavits were read to

Mary of Scotland, in prison, imputing to her great crimes, the unhappy queen said, "Who are the witnesses? [for their names were not given;] bring them before me, and they will forswear their falsehoods when they meet me face to face." The other instrumentality (the right of the triers to look upon the witness) is auxiliary to this. It brings knowledge of whatever is accomplished for innocence by the prior means home to the right quarter, and in the right way; but its function does not stop there. It acts independently of the rules of evidence, by its own inherent power; and sometimes renders a right derived from those rules unnecessary. Thus the inspection by the jury of a witness may dispense with a cross-examination; but when this fails, it becomes auxiliary also to the rules of evidence, and gives to the right of cross-examination, derived from those rules (*not* from the constitution), a power which it could not have without it. It is thus sufficiently manifest that the *status* of the "witness," in a criminal prosecution, while it creates no rule of evidence, secures to every man accused of crime the largest amount of impunity from the operation of those rules which justice can allow.

When and where shall this meeting transpire? Not in the secret chamber of the grand jury—not when complaint is made before a justice preliminary to a warrant; but whenever and wherever a "criminal prosecution" has ceased to be a proceeding *ex parte*, and has taken the matured form of a *legal accusation of crime*, and the witness is brought to sustain it. In "all criminal prosecutions" the right shall obtain, says the bill of rights. These words embrace, I think, every form of "criminal prosecution" known to our laws. In prosecutions by presentment or indictment, the additional right of a speedy trial by a jury of the vicinage is given; but I am not prepared to say that the right to meet the witness "face to face" is confined to that tribunal. Doubtless this security was *mainly* intended for the hour and place of actual peril, when liberty and life should be in greatest jeop-

ardy, when the accused should stand before a tribunal having power over either or both; but the words are broad enough to cover the initiate prosecution, whenever and wherever it takes the matured form of a legal accusation of crime. And the same words, as well as the reasons on which they rest, carry the right through every stage of the "criminal prosecution," so long as the "witness" can by the mode of procedure be brought "against" the accused. While the "witness" may swear, he shall swear "face to face" with the accused. The security lasts as long as the peril, and the protection never ends until the peril is merged in judgment.

I deem it very fit to put a like question touching other and kindred rights secured by the same pregnant section of the bill of rights. How often shall the accused have counsel? and where? If he once have counsel, is the constitution satisfied? If he have counsel before the examining court, may counsel be denied him before the jury? If once before a jury he have counsel, may he be deprived of counsel on the second trial! How often may the accused have the right of trial by jury? If *once* a jury be empanelled in his case, is the constitutional guaranty at an end? May he be denied that tribunal afterwards? If the jury bring no verdict and are discharged, or if the verdict be set aside, may that constitutional "*bulwark*" be from that time abandoned as having done its office, and the State proceed to judgment by a simpler and more summary process? How often shall the accused have the right to compulsory process to force the attendance of his witness? May the process be denied him once if it has been invoked? These questions answer themselves. No power in the government can rob him of counsel in a "criminal prosecution" at any one of a hundred trials of the same cause. The jury must come a hundred times, if there be as many trials; and in all of them the compulsory process must go for his witnesses; and at every trial the witnesses against him must

meet him "face to face," that he may look for the hundredth time upon the witness while he swears, and every jury may see the manner of the swearing.

It is said the accused once met the witness Nievergelder face to face—met him in a "criminal prosecution"—met him before Justice Butler, and at that meeting *looked* upon the witness and had there the right of cross-examination. That is true. It might also be truly said that Justice Butler had the opportunity of looking upon the witness, and of helping his judgment of the credibility of the witness by an inspection of his manner. Now all that was, if not in obedience to the constitution, at least in harmony with it. The procedure was legal and appropriate, but if it was a "criminal prosecution" in the sense of the bill of rights, it did not end there. It was but preliminary to something that must follow; and, touching what was to come, the bill of rights speaks its solicitude, and not only re-asserts, but multiplies its precautions. Before Justice Butler the accused was not *on trial*. That functionary had no power over life or limb—not even for a moment. He was armed with no authority to acquit or condemn. He took the initiative in accusation, but his action could neither bind the State nor the accused. He could discharge the prisoner, but could not free him from indictment. He might lawfully suggest that an indictment would be proper, but the grand jury could ignore the bill. His action was not even *necessary* to the indictment; it might lawfully precede, but could not control it. He was acting within the scope of legal inquiry for crime, and incidental to this right was a temporary power over the liberty of the accused, by warrant and mittimus, for that space of time which lies between the accusation and "the speedy trial by a jury of the vicinage." I have said the constitution gives the accused a right to meet the witnesses against him face to face before the examining magistrate, but I am not clear in this. The question depends upon what is meant by the "criminal prosecution." Is the de-

fendant before the justice "the accused?" or does he only become "the accused" when charged by presentment or indictment? It is not necessary to decide the question upon this record. The constitution either did or did not secure to the accused the right of meeting the witness Nievergelder face to face before Justice Butler. If it did not, then the right obtains *only* before the traverse jury on indictment. If it *did*, who will, who can maintain that the same provision which secures this right to the accused in a place and at a time when he is not in peril, denies it to him in the place and hour of his utmost need?

I have said Justice Butler could look upon the witness while he swore and he helped in judgment upon the credibility of the witness by the manner of his swearing; but how could his convictions of the truth or falsity of the witness reach the *jury?* There is no legal avenue open for the transmission of such convictions. They are reached only by sight, and they can be made only upon the mind that sees. But if there were no such difficulty, the moral and legal responsibility of each juror is his own. It could in nowise be governed by the convictions of the justice. The justice might credit the witness, while the juror would disbelieve him, or *vice versa*. Besides, the fact that the witness had sworn before the justice in a particular way might be, as it often is, the conclusive reason for unbelief of his testimony before the jury. Perjuries are oftener unmasked by the antagonism of the past and present swearings of the witness touching the same transaction than by any other single cause. Confronted with his contradictions he hesitates, stammers, chokes, and plunges by utterance into transparent falsehood, or proclaims the perjury in silence by the pantomime of the soul.

As to the right of cross-examination before the justice, the accused had it, but he did not get *that* from the constitution. He would have had it before the same justice, at the same time, if the suit had been on an account for twenty dollars, as

he would have it in ejectment in other tribunals, or before arbitrators, or in the chamber of commerce, or in a church investigation, or before a committee of the General Assembly, or of the Congress of the United States. The right of cross-examination comes from the rules of evidence, a complex code enacted by expediency, policy, and necessity, and adapted by its flexibility to the exigencies of investigation. This code cannot be found in the constitution of a State. I know of but one instance in our constitution in which a rule of evidence is established, and that is the provision touching prosecutions for libel—"that the truth thereof may be given in evidence." But I have already shown that the largest exercise of the right of cross-examination before the justice could never fill the measure of the defendant's constitutional right before the jury of the vicinage. It could not bring the witness face to face—it could not inform the triers of his moral aspect while swearing—it could never abolish (for it is eternal) the distinction between a paper and a man. This right of cross-examination before a justice is in point of fact rarely exercised, and frequently for the obvious reason that the defendant is not prepared to exercise it. The proceeding is summary and hasty. When the prisoner is brought before the justice, he must, "as soon as may be, proceed to examine the complainant and the witness in support of the prosecution." The defendant, suddenly arrested and borne "forthwith" to the magistrate, meets, for the first time, the witnesses against him. He has had neither time nor opportunity to gather information of their character, their antecedents, or connection with the prosecution against him. The names of the witnesses are endorsed upon the indictment for the very purpose of enabling the accused to make such inquiries. And such knowledge is essential to the intelligent exercise of the right of cross-examination. Besides, he is not on trial, and should not be compelled to make defense; and cross-examination is defense. He may, at his option, without the surrender of any the least of his legal rights, withhold all

defense until he shall be brought on trial before his peers, who alone have power to decide his guilt or innocence. Every lawyer experienced in the defense of men accused of crime, knows the impolicy, as a general rule, of attempting before indictment, the defense of the accused, whether he be innocent or guilty. If, by the words "the accused has the right to meet the witnesses against him face to face" the framers of the constitution intended to give the right of cross-examination, they failed to accomplish their design. The words do not convey the right. They do provide for a meeting of the "witnesses" and the accused, but what shall be done when they meet is not provided. The manner of the meeting, face to face, and the place of meeting, establish a silent moral power in the accused and in the jury over the witness—the power of the eye instructed by the moral sense; but the power to put questions must be derived from some other source. The words established the presence of the witness near the accused, and presence would be a very great facility to the right of cross-examination, (though it is not essential to it) if such right belongs to the accused. The words are apt words, and prove that those who used them felt the importance of phraseology. Why, if their only purpose was to secure the right of cross-examination, did they not use words fitted to convey that idea? Why not say, the accused in all criminal prosecutions shall have the right to cross-examine the witnesses against him? But if the words do give the right of cross-examination, that is not the only right they give, and therefore, the words can never be satisfied by a cross-examination.

## ARGUMENT OF THE CASE OF THE STATE v. BAKER.

A review of the decision of the Supreme Court in the case of McO'Blenis was earnestly and forcibly urged by Mr. WRIGHT:

1st. Because that decision was made by a divided bench on a constitutional question; 2d, because of the importance of the question involved, regarded either as a limitation on the judiciary department of the government, or as a personal security of the citizen against the oppressive action of the government; and, 3d, because of the grounds on which the decision is put by the majority of the court.

If the reasoning of this decision be properly understood by me, several propositions, urged in my former argument, are conceded, viz: 1st, it is granted that the provision of the bill of rights, supposed to have been violated, did not establish or seek to establish any rule of evidence; 2d, it is conceded that it was not the object nor the effect of that provision to secure the right of cross-examination; 3d, it is conceded that the provision contemplates and provides for this meeting of the accused and the witnesses against him in "that tribunal where his guilt or innocence is to be finally passed upon"—that is, before the traverse jury; 4th, it is admitted that this right is an important and valuable personal security—valuable as a test of the truth or falsehood of what is sworn by the witness against him; but it is insisted that the right is not secured in all cases—that the provision is not universally applicable—that it establishes only a wise general rule—that there are exceptional cases out of its operation—and that the case at bar was one of the exceptions. The decision is further understood to maintain that the exceptions were as well understood as a rule out of which they came; and that as a consequence of this knowl-

edge in adopting the rule, the framers of our bill of rights must be understood as adopting the exception.

The result of the reasoning employed in the decision is that to express *in words*, the true meaning of the bill of rights, it should be read in some one or all of the following phraseologies: 1st, "In all criminal prosecutions the accused has the right to meet the witness against him face to face, *except* in cases of dying declarations in reference to the same homicide, and in cases where the deposition of a witness has been regularly taken in a judicial proceeding against the accused in respect to the same transaction, and in his presence, when the subsequent death of the witness has rendered his production in court impossible;" or 2d, "In all criminal prosecutions the accused has the right to meet the witnesses against him face to face, *except* in cases where necessity, or the proper administration of justice shall dispense with the presence of the witness in open court;" or 3d, "*Except* in cases wherein necessity shall render a resort to subordinate evidence proper in furtherance of justice;" or 4th, "*Except* in cases where, by the rules of the common law, subordinate testimony is legal.

I. An exception to a provision so fundamental as the constitutional declaration of the rights of a people can only be declared by the instrument itself. This is a clear result deduced from the nature and object of the instrument. It is organic, fundamental law—the only law that is fundamental, because unchangeable by the organism it creates. It is binding on all the parts of that organism—that is to say, on every department of the government. No modification, not the slightest, can be made of it by the judiciary, by the executive, or by the legislature. It is a prohibition on all, and its only sensible foundation is distrust of all. A power in either department of the government to declare exceptions to its provisions not therein made, is incompatible with the idea of prohibition in the instrument. It is no longer a prohi-

bition on that department which can make the exception. The power to create exceptions is a power above the constitution; and the power to declare exceptions not declared in the instrument is a power to create exceptions. The appellatives "wise," "expedient," "just," "necessary," applied to the exceptions created, constitute no limitations of the creating power; nor are they palliatives of the power exercised; much less are they authority. The power to create exceptions is a power to destroy the instrument. The instrument is of infinite obligation or of none. The judiciary may construe the constitution, but they must construe its words as they are written.

II. Tried by this test, there is no exceptional case which dispenses the meeting of the witnesses and the accused before the tribunal of final judgment. Not a word of the constitution hints at such exception. The words used are words of universality. "In *all* criminal prosecutions" this meeting shall transpire. If it had been added "without exception," the idea of universality would not be strengthened. The infinite comprehensiveness of "all" renders "without exception" a tautological platitude. The added words might show a *desire* for *emphasis*, but they could not impart it. If the trial of Baker was a criminal prosecution, it was embraced by the clause, for it embraces "*all* criminal prosecutions." Can the court strike out the word "all" and insert "most" or "some;" or strike out "all" and insert nothing? And is not that precisely what the court in effect has done? Again, why did the framers of the constitution write "all" before "criminal prosecutions?" It must be assumed that they wrote it for a purpose. It must also be assumed that they chose the word to accomplish that purpose; and it cannot be denied that the word selected is the most comprehensive in our language. It cannot be denied that if their purpose was to cut off all exceptions to the rule they were about to establish, the selected word was the

best word in our language to accomplish that purpose. The only other thing necessary to the argument, to give it the force of demonstration, is to assume that they knew the meaning of the word. Even that assumption is not necessary, for it is susceptible of proof from the use they make of it in the same section. "In *all* criminal prosecutions the accused has the right to be heard by himself and counsel." (Constitution, art. 13, § 9.) Did they mean that there should be any exception to that? "In all criminal prosecutions the accused has the right to demand the nature and cause of accusation." Did they mean to cut off exceptions to that rule? "In *all* criminal prosecutions the accused has the right to have compulsory process for witnesses in his favor." Did they mean to allow exceptions to that rule? "In all criminal prosecutions on indictment or presentment the accused has the right to a speedy trial by an impartial jury of the vicinage." Was it their understanding that "practical wisdom" or "great expediency" or "necessity" should constitute an exception to this rule? "In all criminal prosecutions the accused cannot be compelled to give evidence against himself." Did they mean that cases might arise in which compulsion would be lawful? "In all criminal prosecutions the accused shall not be deprived of life, liberty or property, but by the judgment of his peers or the law of the land." Was it their purpose to allow an exception to this rule? The only remaining part of this section is "in all criminal prosecutions the accused has the right to meet the witnesses against him face to face." Is not the question as proper in this case as in the preceding ones? Did they mean to be understood as allowing exceptions to this rule? On what known rule of construction can the same word, applied as a word of qualification seven times in the same section, be construed to have different significations in the minds of those who employed it? Did the framers of the constitution employ the word six times in the same sentence to cut off all exceptions, and in the seventh to create

exceptions; and this too in the case of a word which has no signification in the law different from its vernacular import? Add to this the absence of all intimation, suggestion or hint by them of a difference in the signification of the word as used by them in its application to the various subjects embraced in the section, and the discrimination assumed becomes impossible. Extend the subject of inquiry to the whole instrument and in no part of it is this discrimination a possibility. Again, in construing the bill of rights of a people, special observance of the *words* of the instrument is a manifest duty, because they are intended to express limitations upon the powers of the government, and prohibitions upon every department thereof. Being limitations founded in distrust of every department of the government, and essential to liberty, it must be presumed that they are marked out with care, and since words, written words only, are employed to mark the boundaries of power, it must therefore be presumed that words are chosen for their aptitude to enunciate clearly and unmistakably the limitations intended. Perspicuity—desirable at all times—becomes a necessity when limitations are to be put upon power, for power will not see a limitation unless it be clearly defined. In the enunciation of a bill of rights, it must be assumed that phraseology is studied. I submit with confidence that our language does not furnish a clearer paragraph than that provision of the bill of rights which is the subject of inquiry.

III. If exceptions were recognized by the common law to the rule in question, and such exceptions were known to the framers of our bill of rights at the time of its adoption, words of universality must be understood as intended to exclude the exceptions. In other words—because it was known that, by the practice of courts acting under the common law, cases had arisen in which the presence of the witness before

the jury had been dispensed with, therefore a word of universality must be regarded as a word of exclusion. * * * * * * It is said, "the great security of the accused, after all, is in the fundamental principle of the common law that legal evidence consists in facts testified to, by some person who has personal knowledge of them, thus excluding all suspicions, public rumors, second-hand statements, and, generally, all hearsay testimony, whether oral or written, from the consideration of the jury." The framers of our constitution manifested at least solicitude to throw around the accused every bulwark which might protect innocence against an unjust or wicked governmental prosecution, but they did *not* provide for him this greatest of all securities. The next General Assembly may declare hearsay testimony legal and competent in all cases, and break no commandment of the constitution. The rules of evidence are not to be found in written constitutions. The legislative and judiciary departments of the government are trusted in this behalf. * * * But while the constitution does not provide what the witness shall say, it does provide the greatest security the wisdom of man has devised that what he does say shall be true. It does not provide that the witness shall speak only what he knows, but it does furnish a security that he shall not hurtfully to the accused, say more than he knows. This greatest of all constitutional securities is *presence*—the presence of the witness face to face with the accused before that tribunal which holds the awful power of judgment. * * * This security has been denied the defendant. * * * English and American judges have confounded the right of presence with other and distinct rights. They have confounded it with the other right of cross-examination. Cross-examination is not presence; nor is it a constitutional right. Others have confounded presence at the trial before the jury with presence elsewhere, and have treated presence elsewhere as a satisfaction of the constitution. Others base their decisions on the *danger* of enforcing this constitutional right in every

case. Others rely upon the policy of subordinate rules in furtherance of justice. The constitutional provision is superior to policy. There can be no policy in denying a constitutional right. So, too, it has been thought that if the State cannot be permitted to read a deposition against the accused, the accused cannot be permitted to use a deposition in his defence. Was the bill of rights made for the protection of the State? There is not the shadow of a pretence for reciprocity of rights in the case. The American decisions cited, contain concessions which logically give up the question. * * *

Why, I ask, are the facts contained in the deposition of a dead or absent witness not entitled to "full faith" at the hands of the jury who are to consider them? It is not because they are not facts sworn to by a witness who has personal knowledge. That is not the reason. If faith in the facts communicated be shaken, it is because of the absence of the witness—because the only test of their truth or falsehood provided by the constitution is taken from the jury. The *presence* of the witness is wanting, and that is all that is wanting; what is wanting is the very thing the constitution says shall *not* be wanting. * * * But how are the jury to determine the extent of their "faith" in the "facts thus communicated?" How are they to determine what would have been the measure of their faith in the witness if they had seen and heard him swear, so as to deduct the loss against the deposition? It is too manifest for further elaboration that on principle the thing cannot be done; and in practice, the deposition is taken for truth, unless it be contradicted by itself or by independent evidence. * * *

When our constitution took up this principle of presence, it is admitted the principle became fixed and unbending but it is insisted the exceptions went with the principle! If so, the exceptions became, by their elevation, fixed beyond the reach of legislative or judicial action. It is apparent from this assumption, that it is a matter of the greatest im-

portance to know what exceptions went up with the principle. Are they only the exceptions declared by the English courts before the adoption of our constitution; or do they embrace such as may thereafter be declared by the courts as falling within the reason of the previous exceptions? I have shown that the declared exception of the deposition of a dead witness did not spring from any actual necessity; but if the basis of that exception be an assumed necessity, assumed and declared by the common-law courts of England creating the exception, are those exceptions, which hereafter may be declared by the English courts of common law or our own to rest on the ground of such necessity, to become part of the constitution also? Again, are the constitutional exceptions to extend beyond the ground of assumed necessity? * * *

And cases which shall hereafter arise coming within this mischief of inconvenience—declared judicial inconvenience—will they too, make part of the fundamental law? If the exceptions which went up with the principle into the constitution are such as rest, or are supposed to rest, upon necessity, the courts must declare the necessity, and they will follow the precedents—they will hold that to be *necessity* which has been judicially so declared. If the wider basis of *inconvenience* shall determine the exception, what is inconvenience will be reached by the same process. Already has it been decided by the St. Louis criminal court, that the deposition of a witness (taken before the examining magistrate) who was out of the State at the time of the trial, was competent evidence against the accused. How long will it be before an absence of sixty miles from the place of trial shall be deemed judicial inconvenience sufficient to let in a deposition? One step more—if the bill of rights be not in the way, why shall not depositions be read in criminal as in civil cases, since the rules of evidence in both cases are the same?

I submit that exceptions are excluded by our bill of rights.

1st. Because no exception is declared in the constitution. 2d. Because, with a knowledge of many relaxations of the principle, while it remained a common-law principle, a word of universality is introduced which was unknown to the common law. 3d. Because any exception is necessarily a *total* surrender of the principle itself in the excepted case. 4th. Because the statute of Edward was designed and had the effect to cut off the common-law relaxations of the principle which had grown into precedents prior to its passage; and our bill of rights is stronger against relaxations than was the statute of Edward. 5th. Because the letter, the clear letter of the constitution, is against all exceptions. 6th. Because its letter is supported by a manifest and admitted reason. 7th. Because if the letter and reason of any provision of our bill of rights are not conclusive as a prohibition on the judiciary department of the government, there is no limitation upon judicial power. 8th. Because no suggestions of policy or necessity can modify or relax a constitutional right, though announced judicially by a hundred precedents. 9th. Because the precedents drawn from England are not in point, except such as furnish constructions of the statute of Edward, and they are against the exceptions. 10th. Because the American precedents cited are most of them from States that have not our bill of rights, and have never gone beyond the common law and Magna Charta in securing the rights of a free people—(such are the States of New York, South Carolina and North Carolina); and the remainder are based upon reasoning—repudiated by this court—which demonstrates a total misconception of the design and object of the clause in question, and which involves a confusion of the right secured with other and independent rights secured in the instrument and also because they are based upon the previous precedents made under the common law and the charter; and lastly because, if they were in point, they are not authority here.

IV. As to dying declarations, the courts put them on the ground that the dying man is not the witness; the witness is he who swears to them in open court in the presence of the jury and the accused; and therefore, the constitution is not violated. But ingenuity has never yet been astute enough to make the officer, or scrivener under his direction, who testifies to what is called the *preliminary proof*, the witness in the case. If a constitutional right can be turned by such strategy, it ceases to be a thing of value.

## REG. v. AUSTEN AND ANOTHER.

### Court of Criminal Appeal, January 19, 1856.

(Before POLLOCK, C. B., ALDERSON, B., COLERIDGE, and WILLES, JJ.)

(Cox's Criminal Law Cases, vol. 7, p. 55.)

"Evidence—Admissibility of deposition—Foreign witness absent abroad. Upon a trial for felony it is no ground for receiving in evidence a deposition taken before the committing magistrate that the witness is a foreigner and absent in a foreign country.

"The following case was reserved by Mr. Bodkin:

"Joseph Austen and John Turner were tried before me, acting as assistant judge at a session for the county of Middlesex on the 14th day of August, 1855, for stealing various articles the property of William Doodt.

"The charge was fully established against them; they were found guilty, and sentenced to penal servitude for six years.

"They were ordered to remain in prison, but the execution of the judgment was respited until the opinion of the criminal court of appeal could be obtained upon the following facts:

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"William Doodt not being in attendance to prove that the stolen property was rightly stated to belong to him, it was proposed to read his deposition taken before the committing magistrate as evidence of that fact."

The deposition had been duly taken in the presence of the prisoners, who had the opportunity of cross-examination, and it was satisfactorily proved that William Doodt was not absent with any intention of defeating justice, but that being a foreigner, serving on board a foreign vessel at the time the property was stolen, he had, since the committal of the prisoners, returned to his own country, and at the time of the trial was residing in a foreign kingdom. It was contended, that although this cause of absence was not within the provision of the 11 and 12 Vict. c. 42, s. 17, the above facts made the deposition receivable independently of that statute, and considering it desirable to have the point settled, I received the evidence. I have now to submit to the justices of either Bench and Barons of the Exchequer whether such reception was right.

This case was first argued on the 24th November, before Jervis, C. J., Parke, B., Wightman, J., Cresswell, J., and Willes, J., but the argument was not then concluded, and the case was now re-argued by the same counsel.

METCALFE for the prisoner: The deposition was inadmissible; for there was no evidence that the witness was either dead or so ill as not to be able to travel; and those are the only cases in which the statute 11 and 12 Vict. c. 42, s. 17, provides for the admission of the deposition.

PARKE, B.: The statute mentions those two cases, but it does not necessarily exclude all others. (*b.*)

METCALFE: It is reasonable to suppose that the legislature intended to exclude all others by mentioning only two. But even before the statute of 11 and 12 Vict. c. 42, the deposition would not have been receivable under the circumstances here stated. It is no more than a case of temporary absence, which might be a ground for postponing

the trial, but is no ground for receiving the deposition in evidence.

CROMPTON, J.: It has been held that the deposition of a witness who has gone to sea since his examination could not be received.

METCALFE: In R. *v.* Hagan (8 Car. & P. 167), where, however, it was received by consent. And in R. *v.* Savage (5 Car. & P. 143), where the prosecutrix was so near her confinement as to be unable to travel, her deposition was tendered in evidence; and 1 Hale, 586, and Kelyng, 55, were cited; but Patteson, J., said, "That has been doubted by Mr. Starkie (2 Stark. Evid. 76), and I think the evidence is not admissible." Therefore, neither at common law nor under the statute was the deposition in this case admissible, and the conviction must be reversed.

CAARTEN, for the prosecution: This deposition was admissible upon the principles of the common law, and the statute 11 and 12 Vict. c. 42, s. 17, does not render inadmissible any deposition which was previously admissible. At common law it was laid down in an anonymous case in Godbolt, 326, that the deposition of a witness in an English court, in a cause betwixt the same parties, may be read to the jury, "so as the party make oath that he did his endeavor to find his witness, but that he could not see him, nor hear of him;" and that is cited as law in 1 Stark. Evid., 265, and 1 Taylor on Evidence, s. 349; but Taylor adds, that "in criminal proceedings it would seem that a similar latitude is not allowable," referring to Lord Morley's case (Kel. 55; 6 How. Sta. Tri. 771). However, the rules of evidence are the same in civil and in criminal cases (per Abbott, J., in R. *v.* Watson, 2 Stark. R. 155).

POLLOCK, C. B.: The general rules are the same, but there are particular exceptions. The examination of a prisoner would not be admissible against him in a criminal case, unless, in the mode of taking it, the statutory requisites were complied with; but in a civil case it would.

CAARTEN: The authorities, however, are not confined to civil cases, for even in criminal cases Lord Hale (1 Hale, 305; 2 Hale, 52) lays it down that the deposition may be given in evidence if the witness is prevented from attending by sickness, or is unable to travel. (He also referred to 1 Chitt. Cr. Law, 586.)

WILLIAMS, J.: But Mr. Greaves, in his edition of Russell on Crimes (vol. 2, p. 889), considers that not to be law, and refers to R. *v.* Savage (5 Car. & P. 143), and R. *v.* Osborn (7 Car. & P. 799), as well as to the observations of Mr. Starkie (2 Stark. Evid. 276).

CAARTEN: The older authorities, however, certainly support the proposition; and in Lord Altham *v.* The Earl of Anglesey (Gilb. Eq. Cas. 16; Rep. Temp. Holt, 736), it was held that where the witness resides in a place beyond the jurisdiction of the court his deposition may be read. It seems, therefore, that at common law the deposition was admissible in all these cases; the death of the witness, his permanent or even his temporary illness, his absence beyond the jurisdiction, and his being kept away by the procurement of the prisoner.

POLLOCK, C. B.: It would be contrary to the inveterate practice of many years' growth to receive a deposition merely on the ground of the absence of the witness from any cause which might be merely temporary. If the witness is dead the case is clear.

ALDERSON, B.: Or kept away by the prisoner, or permanently insane.

WILLIAMS, J.: Or, as is said in Russell on Crimes, p. 889: "If there be a permanent inability to attend; as, if the witness be so ill that there is no probability that he will ever be able to attend."

CAARTEN: If a witness is absent in a foreign country he is dead for all purposes of evidence, just as in Godbold, 326, it is said: "If a party cannot find a witness, then he is, as it were, dead unto him."

ALDERSON, B.: Then if a witness is absent in Scotland or Ireland he is to be considered dead in law?

CAARTEN: If an attesting witness was resident in Ireland his handwriting might be proved as if he were dead. (*c.*)

ALDERSON, B.: Is there any case in which inability to attend at the moment of the trial has been held sufficient to let in the deposition? In this case, for all that appears, the witness may be in Calais, and if any efforts have been made to obtain his attendance they might have been successful.

CAARTEN: It is found that he was not absent with any intent to defeat justice.

ALDERSON, B.: That renders it more probable that his attendance might have been secured if proper exertions had been made. The only ground in this case is, that the witness was not subject to the process of subpœna; but that is not enough. In Boyle *v.* Wiseman (24 L. J. 160, Exch.) it was never suggested that that alone would be sufficient to let in secondary evidence.

CAARTEN: In R. *v.* Hagan it certainly was done by consent, but if it had been considered contrary to any strict rule of law it would not have been permitted even with consent; and in Buller's Nisi Prius 242, it is said, "If the witnesses examined on a coroner's inquest be dead or *beyond sea* then depositions may be read."

COLERIDGE, J.: In R. *v.* Hagan the judge ruled that without consent it could not be done, but that with consent it might; and there the prisoner was allowed to give in evidence the deposition of the witness because the Crown consented.

CAARTEN: The question is one of considerable importance, as the ends of justice may often be defeated if under such circumstances a deposition cannot be read.

POLLOCK, C. B.: The more important the question the more insuperable is the objection which arises from the inveterate practice of not receiving depositions under such circumstances.

CAARTEN: The principle upon which the admissibility of a deposition in any case rests is, that the party produces the best evidence of which the case is capable, and that principle applies to the present instance. Where the witness is out of the jurisdiction of the court, those who require his evidence are not responsible for his absence, and they may supply the evidence in the best way they can.

POLLOCK, C. B.: We are all of opinion that the deposition was inadmissible. The statute points out two cases in which the deposition may be received, and this is not either of them. It is impossible by any forced construction to bring this case within the statute. Independently of the statute, the reception of the deposition was contrary to the inveterate practice of the judges, and that practice confirmed by at least one decided case.

ALDERSON, B., concurred.

COLERIDGE, J.: I wish not to be understood as expressing an opinion that the statute limits the admissibility of depositions to the two cases there mentioned. There may be several others in which, according to the old rule of the common law, the deposition may be receivable; but in this case the facts take the case out of the rule altogether. It is not even shown that the attendance of the witness might not easily have been obtained. On the contrary, it is quite consistent with the statement in this case, that the witness may have been no further off than Scotland, just on the other side of the border, within hail, and quite ready to come, if called.

WILLIAMS, J., concurred.

WILLES, J.: At common law, the practice of admitting depositions in the absence of the witnesses seems to have been very extensively exercised; and I think, therefore, that it is necessary to look for some broader ground than had been suggested for the decision of this case. The distinction appears to me to be this—between the cases in which the deposition is taken for the purpose of being used in evidence on the trial, if the witness is

absent; and the cases in which it is taken in the course of a preliminary investigation, in order only to ascertain whether the case ought to be submitted to further judicial inquiry. In the former case much greater latitude is allowed than in the latter; but in the latter, the deposition is not receivable in evidence if there is any possibility of procuring the oral testimony. That reconciles all the cases. If the witness is dead or permanently disabled from attending it is admissible even at common law; but, in the present case, there are no facts which bring it within the rule of the common law or the words of the statute.

ALDERSON, B.: I must say, that, in my opinion, the rule as to the admissibility of depositions in lieu of the oral testimony of the witnesses ought to be carefully and rigidly limited; for the same rule which is laid down as to depositions taken by magistrates when the accused is present, and has the opportunity of cross-examination, will apply also to depositions taken by coroners in the absence of the accused. I doubt much whether the practice ought not to be strictly confined to the cases specified in the statute.

Conviction quashed.